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Arnold M. Chutkow Memorial Issue

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SUBSCRIPTIONS AND CONTRIBUTIONS: Mail all contributions and orders for subscriptions or back issues to Dicta Business Manager, University of Denver, College of Law, Denver, Colorado.

This issue of DICTA is respectfully dedicated to the memory of the late Arnold M. Chutkow whose tragic death in early December, 1956, terminated his association with this publication. Mr. Chutkow represented the University of Denver College of Law as Editor of DICTA from July, 1954, until his death. During his tenure DICTA steadily improved in quality of both material and management. The present Editorial Staff extends sincere sympathy to all who share in this great loss. It is hoped that dedication of this issue to his memory will be a small token to acknowledge the great debt owed by DICTA to

Arnold M. Chutkow.

ARNOLD M. CHUTKOW

BY EDWARD I. HALIGMAN

With the death of Arnold M. Chutkow I have lost a dear friend and associate. Persons in all walks of life were shocked and saddened by his sudden, tragic passing. They mourn him as they would a brother, for Arnold always gave generously of himself—his responsiveness and his talent. At only twenty-seven years, he had achieved a record of accomplishment that few men attain in a long lifetime, but his professional success only deepened his understanding of humanity and increased his desire to serve others.

Arnold M. Chutkow

It was in 1952 that I met Arnold in the Judge Advocate General's Corps of the United States Army; he later persuaded me to join him in Denver. His brilliant record as a student of the University of Chicago, where he began his legal career, was well known, even beyond the campus. He was elected a member of Phi Beta Kappa and the Order of the Coif and was chosen as the editor of the *University of Chicago Law Review*. He graduated from law school in 1951 at the head of his class, possessor of Ph. B and J. D. degrees. Immediately afterward he joined his father, Samuel Chutkow, and his uncle, Noah Atler, as a member of the law firm of Chutkow and Atler. In 1952, he was awarded a direct commission as a first lieutenant in the Judge Advocate General's Corps and served as an instructor in the Judge Advocate General's School at Charlottesville, Virginia, until he was released from active duty in 1953.

Arnold was engrossed in the profession of law. He decided that active practice best offered an outlet for his ability, and he resisted several tempting offers of teaching positions in law schools. However, he had no thought of overlooking his great interest in teaching and readily accepted a part-time appointment as a member of the faculty of the University of Denver Law School. His seemingly limitless energy found outlet also in his editorship of *Dicta* and in his acting as a member of the Board of Directors and discussion leader for the Colorado chapter of the University of Chicago Great Books Foundation. He contributed

many articles to legal publications, his last piece having appeared in the November-December issue of *Dicta*.

Arnold's interest in education was more than a schoolroom matter; he helped many a student of promise to obtain a scholarship to the University of Chicago. His desire to help others was as broad as his own professional and personal interests, and all who came to him found warmth and understanding, coupled with sincere enthusiasm in helping them.

His love for his wife, Diane, and for his two sons was an inspiration to him. Demands of home and career only emphasized for him his sense of duty to the community and made him active in communal and political affairs. Despite his activities and achievements, as his intimate friends will always remember, Arnold was ever gracious, sincere, and humble. His deep regard for all with whom he came in contact, particularly members of the bar, won him wide respect.

It has been said that a man's life cannot be measured in terms of years, and I think this is very true of Arnold. His monument will be the record of his accomplishments and the affection and respect in which he was held by all who knew him.

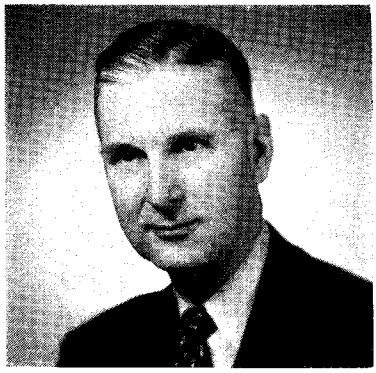
Notice

A scholarship fund in memory of Arnold M. Chutkow is being established at the University of Denver. Its purpose will be to provide the "Arnold M. Chutkow Scholarship" to an outstanding student member of the Board of Dicta. Contributions may be sent to Stanton D. Rosenbaum, Chairman, 1030 University Building, Denver, Colorado. Checks should be made payable to "University of Denver Chutkow Memorial Fund." The family will be notified of your contribution, if you so desire.

MARKETABLE TITLE

WHAT CERTIFIABLE COPIES OF COURT PAPERS SHOULD APPEAR OF RECORD

BY ROYAL C. RUBRIGHT



Royal Rubright: Born in Denver, Colo.; graduated from Colorado University with B. A. and L. L. M.; instructor at Denver University and Colorado University on subject of Titles to Real Property; author of various articles on Real Property Law which have appeared in **Dicta** and the **Rocky Mountain Law Review**; member of Denver, Colorado and American Bar Associations; now a practicing attorney in Denver.

There is some variation in the requirements lawyers make concerning the recording of certified copies of court orders and decrees affecting real estate. Those with extensive real estate practice are in general agreement, but those who only occasionally encounter titles with court proceedings involved are often not certain as to what papers should be recorded.

While there are a few statutes which prescribe exactly what must appear of record, recording practice has largely evolved by common consent.[1] Some of the requirements have crystalized into Real Estate Title Standards, but many others are not sufficiently controversial to be included in the standards.

In discussing this subject, one guiding principal should be remembered. There is an observed, growing and sensible practice (this is intended for Denver lawyers, the lawyers in outside counties long ago adopted the practice) of relying upon the abstract and not pulling the books in the recorder's office to check the original instruments as recorded. In the light of this practice, it is increasingly imperative that the abstract of title disclose, in reasonable detail, enough of the court proceedings so that the attorney examining the abstract may approve the title without spending the extra unpaid time necessary to examine the records in the court house itself. This article will attempt to present a systematic outline of the commonly agreed documents that are necessary to be recorded.

1 For an analysis of statutes see Rubright, "Check Lists For Court Proceedings In Which Titles To Real Estate Are Involved," 23 Rocky Mtn. L. Rev. 371 (1951).

I. INHERITANCE AND ESTATE TAXES

In all cases where transfer of title is made following the death of an owner, it is necessary to record evidence of release of the Colorado inheritance tax lien.[2]

Although prior to April 26, 1943, there was no statutory requirement for recording a release of inheritance tax lien, it was well settled practice among lawyers, that if the estate was administered in one county, and the land was located in another, the receipt for inheritance tax must be recorded in the county where the land was situated. Otherwise, a fellow lawyer might suffer the expensive (because he usually cannot charge for such time) task of traveling to the county seat, for the sole purpose of finding the receipt among the court records. After 1958 this problem will no longer exist because the statute which requires the recording will then have been passed fifteen years ago.[3]

When the estate exceeds a certain size, a federal estate tax question arises. If the inventory or Colorado inheritance tax papers in the estate file indicate a gross estate of $60,000 or more, the federal statute requires that a federal estate tax return be filed. While it is true that if a wife becomes entitled to the full marital deduction, no federal estate tax will become payable unless the estate exceeds $120,000 yet the examiner of title must satisfy himself from an inspection of the federal estate tax return in any estate exceeding the $60,000 exemption whether a tax was incurred and if incurred, whether it was paid. To permit such inspection, and to keep available the evidence of nontaxability, it is almost imperative that the attorney for the estate place in the estate file in the county court a conformed copy of the federal estate tax return for inspection by future examining attorneys.

If the estate file indicates that the estate is subject to federal estate tax, and if the property is located in the county where the estate is being administered, lawyers do not require the recording of a certificate releasing the federal estate tax lien. The examining attorney inspects the court files and finds receipts showing payment of federal estate tax and also any deficiency tax which may have been paid. If the land is located outside the county where the estate is pending, the attorney requires a certificate releasing the federal estate tax lien on the particular land.

It is a frequent practice not to file a federal estate tax return until fifteen months from the date of death. The examining lawyer representing an original purchaser from the estate will normally rely upon a letter from the executor or the attorney for the estate that the federal estate tax return will be filed in proper time, will include the property under consideration, and the receipt for payment of the tax and any deficiency receipts will be placed in the estate file so that they may be inspected by examining lawyers. Since the executor is personally liable for the tax, this arrangement is realistic.

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[2] See Real Estate Title Standards No. 14, 30 & 54, and statutes there cited.
[3] See Colo. Rev. Stat. Ann. § 138-4-36 (1953), and Real Estate Standard No. 76.

II. TITLES DERIVED THROUGH ESTATE PROCEEDINGS

(A) Sale of property from the estate of a minor or a mental incompetent, or from an intestate estate, or from a testate estate in which the will contains no power of sale.

Documents to be recorded:

(1) A good and sufficient executor's, administrator's, guardian's or conservator's deed, normally on a printed form containing a copy of the order of court confirming the sale certified by the clerk of the court.[4]

(2) Release of Colorado inheritance tax lien and in proper cases evidence of payment of federal estate tax.[5]

(3) If the sale is being made by an executor, or by an administrator with the will annexed under a will which has not conferred a power of sale, there is some difference of opinion whether or not the certified copy of the will and the order admitting it to probate should also appear of record. The better practice is that the will and the order of probate should be recorded since there is a statutory requirement[6] that other assets shall first be sold before resorting to certain classes of real estate.

(B) A mortgage or deed of trust from an estate is comparative-

4 Colo. Rev. Stat. Ann. § 152-13-26 (1953).
5 See Division 1 supra. If a guardian or conservator is selling the property, of course no Colorado inheritance or federal estate taxes are involved.
6 Colo. Rev. Stat. Ann. § 152-13-15 (1953).

ly rare, but almost the same documents should be recorded as in a sale. The mortgage or deed of trust will, however, contain a certified copy of the order of court authorizing the mortgage. There is no requirement that the mortgage be confirmed.[7]

III. PERPETUATION OF TESTIMONY

Proceedings to perpetuate testimony were often urged to establish the identity of the surviving directors of a corporation whose corporate existence had expired, when twenty years had not elapsed since the recording of the deed or other instrument reciting who the directors were.[8] Perpetuation is still used to establish marriage, divorce, birth, death, descent, or heirship, where a period of twenty years has not elapsed since the recording of some document in which those recitals are contained. In all the peceding situations, if twenty years have elapsed, the recitals are prima facie evidence without the necessity of a perpetuation of testimony.[9] In some sections of the state, lawyers apparently have adopted a custom of relying upon affidavits to furnish proof of identity and to reconcile variations in names. I have not the slightest desire to weaken that practice which has been adopted by local "ground rules" but the practice in Denver is more rigid in construing the statutes and perpetuation of testimony is the usual method. Where testimony is perpetuated, the document to be recorded is a certified copy of the testimony given in court and which contains the judge's certificate. If it is taken out of state the copy should contain the testimony and the certificate of the officer before whom the testimony was taken, the entire document being certified by the clerk of the court.[10]

IV. QUIET TITLE SUIT

It seems unnecessary to say that the only document normally recorded is a certified copy of the decree quieting title. Often a lis pendens is recorded. but so far as the examiner is concerned. the presence or absence of the lis pendens is immaterial unless liens or instruments have been recorded between date of beginning the suit and the date of the decree.

V. DETERMINATION OF INTERESTS PROCEEDING

Where more than one year has elapsed since the date of death of a decedent who died intestate, a determination of interests proceeding is quicker and cheaper than the administration of an estate.[11] The use of this method of determining heirs presupposes that all of the heirs are adults. under no disability and that a valid conveyance can be obtained from them.

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7 Id. § 152-13-26.

8 The 1955 session laws achieve the same result by making an acknowledgment containing recitals of such fact prima facie evidence and thus avoiding perpetuation of testimony proceedings. Colo. Sess. Laws 1955 c. 235 at 722. Parenthetically, this is another good example of the fact that the legal profession voluntarily and unselfishly obtains passage of laws which make transfer of title to real estate cheaper and less expensive—and deprives lawyers of business as a result.

9 Colo. Rev. Stat. Ann. § 118-6-7 (1953); see also Real Estate Title Standard No. 19 for evidence of change of name by marriage.

10 Colo. Rules Civ. Proc. 27.

11 It is necessary to wait a year because creditors have one year from date of death to apply for administration. Colo. Rev. Stat. Ann. § 152-7-2 (1953). From the title standpoint therefore, in any such administration the real estate could be sold for the payment of debts due creditors.

Documents to be recorded:

(1) A certified copy of the Decree determining the heirs and present owners of the property, and

(2) Release of Inheritance Tax Lien if the decedent died within fifteen years from the date when the examination of title is being made.[12]

VI. PROCEEDINGS TO DETERMINE HEIRSHIP DURING THE ADMINISTRATION OF AN INTESTATE ESTATE

This proceeding is used when an estate is administered and real estate is owned by the decedent which it is not necessary to sell or mortgage during the course of administration. Upon closing administration the record title to the real estate will be vested in the decedent's heirs at law. This procedure may be regarded as the normal situation, whereas the determination of interests proceeding mentioned in the preceding section of this article is available only under somewhat unusual circumstances.

Documents to be recorded:

(1) Certified copy of a Decree of Heirship, naming decedent's heirs,[13]

(2) Certified copy of the Order of Final Settlement Discharging the Administrator, and

12 See Division I supra.

13 Prior to 1907 there was no statutory provision for a decree of heirship, but the court, in ordering distribution made a finding listing the heirs. Occasionally this situation existed after 1907 If any decree names the heirs and has remained of record longer than 9 years, it is good and title derived by conveyance from the heirs is marketable. Colo. Rev. Stat. Ann. § 118-7-11 and 12 (1953). It is also good after 20 years of record. Id. § 118-6-7.

(3) Release of Inheritance Tax Lien.[14]

VII. TITLE DERIVED BY DEVISEE UNDER A WILL

Documents to be recorded:

(1) Certified copy of the will and of the order of court admitting it to probate,

(2) Certified copy of the Order of Final Settlement and Discharge of the executor, and

(3) Release of Colorado inheritance tax lien.[15]

(a) Occasionally, title becomes vested in a trustee under a testamentary trust so that when the administration of the estate is completed, and the executor discharged, the testamentary trustee will thereafter deal with the property. In this situation the same three documents, mentioned in the preceding paragraph, are necessary, and an additional document will become necessary if the property is sold by the testamentary trustee while the testamentary trust is still in existence. The first question the examiner must determine is whether or not the testamentary trust remains under the jurisdiction of the county court. It is quite common that the testators provide in their wills that the administration of the trust estate shall not be continued by the court after the probate administration is closed, but at that time the assets should be turned over to the testamentary trustee without further control of the court. In this event the court must make a finding that it was not the intention of the testator for the court to continue the administration.[16]

(b) If the court does not make a finding, the statute says that the testamentary trustee shall have the powers and be subject to the liabilities and duties of executors and the court shall retain jurisdiction until the trust is fully executed. If this latter provision is in effect, and if the testamentary trustees convey before the trust is terminated, in addition to the three documents mentioned above, a certified copy of Letters of Testamentary Trusteeship should be recorded, and the testamentary trustee's deed, should

14 See Division I supra.
15 See Division I supra.
16 Colo. Rev. Stat. Ann. § 152-14-11 (1953).

recite specifically the power in the will which permits the testamentary trustees to sell without court order.[17]

(c) If, however, the testamentary trust has been established and remains under the control of the court, and the trust is terminated before the real estate has been conveyed, then in addition to the documents in subparagraph (b) above, a certified copy of the order of discharge of the testamentary trustee should also be recorded. This is not a common situation and such an order should be carefully tailor-made and should contain a court order specifically finding that the events have occurred which terminate the trust. If, for example, it was to terminate when a life beneficiary reached a given age, or died, the court order should specifically find that the beneficiary had attained that age, or that the beneficiary had died, giving the date. The examining lawyer may then determine from the face of the order that the trust had terminated. It is probably unnecessary, in most wills, for the trustee to actually execute a conveyance to the beneficiary, but it might be of some precautionary advantage for the trustee to execute such conveyance and record it with the other papers necessary to terminate the testamentary trusteeship. There is ample authority, however, in Colorado for the proposition that when the event has occurred which terminates the trust so that it is no longer active but becomes passive, that the Statute of Uses operates to vest title in the beneficiaries, presumably without any affirmative act of the trustees.[18]

VIII. TITLE DERIVED THROUGH COURT FORECLOSURE OF A MORTGAGE OR DEED OF TRUST

Because the Colorado Public Trustee Statute offers a speedy and economical method of foreclosure, not too many deeds of trust are foreclosed through court proceedings. In certain instances they must be. For example, when a private trustee is named instead of the public trustee,[19] or perhaps when property is in two counties and there are some procedural difficulties in having a public trustee in only one county make sale, or when there is some defect in the

17 Under the statute cited in the preceding footnote, a somewhat simplified and abbreviated statutory sale proceeding may be followed by a testomentary trustee.
18 See, e.g., O'Reilly v. Balkwill, 297 P. 2d 263 (Colo. 1956).
19 Colo. Rev. Stat. Ann. § 118-3-1 (1953).

title or in the encumbrance, court foreclosure may be resorted to, combined in some instances with a suit to quiet title against the defects. It is a well known fact that many attorneys, because their clients compete for loan business, occasionally are impelled to pass titles for loans which they would be reluctant to pass for owners. This attitude is probably valid because in prosperous times very few loans are foreclosed. If, however, the chickens come home to roost in a particular situation, and the lender is required to foreclose, the lawyer, slightly rueful over his liberality in passing the matter in the first instance, will probably decide as a matter of prudence to foreclose the deed of trust in court and quiet the title against the defect which he fears might be objected to by some prospective purchaser.

The following discussion is off on a tangent but it is justified because it is "hot news" and good news. It was formerly necessary to foreclose through court proceedings in all cases where the United States had recorded a tax lien subsequent in priority to the trust deed being foreclosed.[20]

The Federal government is to be commended on their recent tendency to eliminate red tape and to cooperate with attorneys in solving title problems resulting from such liens. In a recent Technical Information Release,[21] the District Directors of Internal Revenue were authorized to issue "Conditional Commitments to Discharge Certain Property From Federal Tax Lien." Application for such commitments is made to the Special Procedure Section of the office of District Director of Internal Revenue on a form designated: DIR:DEN:C:D:SPS:#81. & #59. Rev. 1956. If it appears that the encumbrances having priority to the United States exceed the value of the property then the Special Procedure Section will issue a "Conditional Commitment to Discharge Certain Property From Federal Tax Lien" on a form designated DIR:DEN:C:D:SPS:#80. July 1956.

Assuming the property is sold at foreclosure sale for only the amount of the delinquent loan plus interest and costs and is bid in by the mortgagee, he should have no trouble obtaining prompt release of the lien based upon the Conditional Commitment by exhibiting the public trustee's certificate of purchase showing the amount the property brought at the sale.

This new procedure should enable a lawyer to bring a public trustee foreclosure relying upon the Conditional Commitment, whenever a federal tax lien is involved. He thus can avoid the additional trouble, delay, expense and one year redemption period otherwise required under a court foreclosure process. A word of caution to any third person bidding at the foreclosure sale. Any sum in excess of the total indebtedness due under prior encumbrances would have to be paid to the United States to secure release of the federal lien. Since the very choice of the public trustee method of foreclosure is predicated upon the fact that a release will

20 28 U.S.C. § 2410 (1952) (the United States had 60 days to answer and one year from date of sale to redeem.)

21 Technical Information Release No. 10, July 11, 1956; see 1956 Std. Fed. Tax Rep. § 6578.

be forthcoming, it is important for a prospective bidder to determine whether such a federal lien exists and to make certain that any excess sum is paid to the government so that the lien will be released.

When a court foreclosure is made, the abstract will ordinarily show a lis pendens as the first document initiating the foreclosure. It will be followed by a decree of foreclosure. There are two cautions which should be observed in connection with the proceedings:

(A) A great number of loans are made by mortgage brokers who later sell them. The deed of trust names the broker company as beneficiary. If the ultimate purchasers of the loans are local institutions, they usually rely upon the well settled Colorado doctrine that the endorsement of the note carries the security. Seldom do they record an assignment of the deed of trust in the public records. In the event of foreclosure it is important, however, either that the original beneficiary of the deed of trust be joined as a party defendant or that an assignment of the deed of trust be recorded. Otherwise, the abstract shows a deed of trust, we will say, to the Lendalot Loan Company, whereas the foreclosure is brought by the Buyalot Mortgage Company. If there is no recorded connection between the two, the mere assertion of an assignment in the complaint is probably not binding upon the Lendalot Loan Company which has an interest of record but is not named as a party in the suit.

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(B) The other common difficulty in the foreclosure decree is that it refers to the indebtedness and the encumbrance "described in the complaint." Since the complaint is not of record, a foreclosure decree of this type, when recorded, is certainly not revealing to the next examiner of the title. After nine years, he would normally make no investigation of the court files, but his abstract shows an apparently unreleased deed of trust and then a dangling foreclosure decree which is not tied to the recorded deed of trust. Sometimes the lis pendens, by referring to a particular book and page of the deed of trust bridges this gap. The better practice is to be vigilant in drafting the foreclosure decree to refer specifically to the book and page of the deed of trust which is being foreclosed.

The sheriff sells the property pursuant to the foreclosure decree and issues a sheriff's certificate of purchase, after six months and any other applicable periods of redemption have elapsed, the sheriff issues the sheriff's deed.

The documents to be recorded:

(1) Lis Pendens (so far as the title is concerned, its presence or absence is not important),
(2) Certified copy of the Decree of Foreclosure,
(3) Certificate of Purchase, and
(4) Sheriff's Deed.

IX. JUDGMENT LIEN FORECLOSURE

Not too common is the title derived through foreclosure of a judgment lien. A judgment creditor obtains a judgment against an owner of property and records a transcript of it which then becomes a lien.[22] If the owner of the property does not pay the debt, the judgment creditor may then cause execution to be issued upon his judgment and the sheriff records a certificate of levy under the execution. He then proceeds to sell the property at a sheriff's sale and unless it is redeemed within the redemption period, he eventually issues a sheriff's deed. The documents which are recorded under those circumstances are:

(1) The Transcript of Judgment,
(2) Sheriff's levy,
(3) Sheriff's Certificate of Purchase, and
(4) Sheriff's Deed.

Perhaps a brief digression is appropriate here. Frequently the owner of property pays the judgment after the transcript is recorded; in which case a Certificate of Satisfaction is obtained from the clerk of the court and when recorded satsifactorily disposes of the lien created by recording the transcript.

Occasionally, however, the debtor does not pay until after the creditor has initiated specific proceedings to sell the property and has caused a Certificate of Levy to be recorded by the sheriff. Because this situation is infrequent, there seems to be some disagree-

[22] Colo. Rev. Stat. Ann. § 77-1-2 (1953).

ment about the documents necessary to be recorded, to clear the record, after the debtor has paid. I have been unable to find express statutory support for the most widely used method by which the sheriff releases the levy at the request of the plaintiff's attorney. As a matter of practice, everyone seems agreed that this is a successful method of disposing of the lien, at least if a transcript of judgment has not been recorded. Since the transcript of judgment is a lien itself, it could be released only by recording the certificate of satisfaction from the clerk of the court, mentioned above. In still more rare cases, a certificate of levy is recorded based upon an attachment, prior to judgment. If the case proceeds in normal course, the abstract will show a certified copy of the decree, the sheriff's certificate of purchase, and the sheriff's deed. If the debtor, however, pays, there is again a little disagreement about whether the marginal release of levy by the sheriff, at the request of the plaintiff's attorney, should be sufficient, or is a dismissal of the action sufficient? It would seem that either should be enough to evidence of record the termination of the suit and the fact that the property is free from any further claim under the court proceedings.

X. MECHANIC'S LIEN FORECLOSURES

These are more numerous than some of the other court proceedings we have been discussing. The abstract will disclose documents recorded as follows:

(1) Mechanic's Lien,
(2) Lis Pendens to foreclose the lien,
(3) Decree of Foreclosure of Mechanic's Lien,
(4) Sheriff's Certificate of Purchase, and
(5) Sheriff's Deed.

Quite often the proceedings terminate before foreclosure sale is reached, and there is some question about which documents should be recorded to free the title from the lien. It depends on when the owner of the property is able to make his peace and settle the litigation. If he settles it prior to entry of the decree the abstract will show a Certificate of Dismissal of the action and a release of the mechanic's lien. At any stage of the proceedings there is another alternative, provided all of the mechanic's lien

claimants are in court and represented by counsel. A stipulation signed by counsel for all the lien claimants, referring specifically to the mechanic's liens and to the lis pendens, and a court order entered pursuant to the stipulation, dismissing the action, would sufficiently evidence the fact that the entire litigation had terminated. If the decree has been entered, and if several mechanic's liens are involved, it may be cheaper to record the decree authorizing foreclosure, and to record the clerk's certificate of satisfaction which will dispose of the mechanic's liens without specific releases.

XI. RECEIVER'S SALES

Quite rarely is property conveyed by a receiver appointed for an insolvent owner of property. Usually the owner has made a voluntary conveyance of the property to the receiver and the receiver has sold it after a court order obtained in a proceeding in which all of the owners of record, and creditors holding unrecorded claims against the owner have been made parties. The examiner of titles is concerned only that those who hold recorded interests have been properly joined and have been served with notice of the proposed sale.

Documents to be recorded are:

(1) The deed to the receiver,

(2) Evidence of the appointment of receiver, either an order appointing him or recitals in the Receiver's Deed that he was so appointed,

(3) A certified copy of the court order confirming the sale by the receiver, and

(4) Receiver's Deed pursuant to court order.

XII. BANKRUPTCY

Many real estate titles become involved in bankruptcies. Normally these are incumbered by one or more mortgages. If, however, the owner has an equity in the property, title is conveyed by deed from the trustee in bankruptcy. In the usual case the owner files the petition in bankruptcy and when the trustee is appointed, the title to the real estate vests in the trustee. The appointment of the trustee is evidenced by an order approving his bond which is usually recorded. The trustee conveys by a trustee's deed. The recorded documents are:

(1) Certified copy of order approving trustee's bond,

(2) Trustee's deed pursuant to court order, and

(3) Certified copy of order of court confirming the trustee's sale.

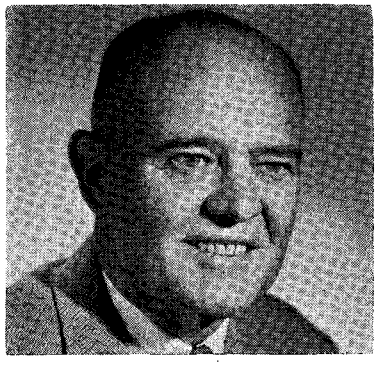
CONCLUSION

It is hoped that the listing of the necessary documents has accurately presented the requirements made by the majority of lawyers. We all desire to require the necessary documents and not to require recording of any that can properly and safely be omitted.

TAX MOTIVATED GIFTS TO MINORS

By William J. Bowe

This article is based on a speech delivered by the author at the 1956 University of Denver Tax Institute and is reprinted with the permission of the Institute.



William J. Bowe: graduate of Fordham College and Harvard Law School; formerly in Judge Advocate General's Department; formerly professor of law, Vanderbilt University; presently professor of law, University of Colorado; author of **Tax Planning for Estates, Life Insurance and Estate Tax Planning, Income Tax Treatment of Life Insurance Proceeds.**

Prior to 1932 gifts to minors were primarily motivated by love and affection. As the title of this article indicates, many, if not most, gifts are today motivated by a very pronounced lack of any love or affection for the tax collector. These tax motivated gifts have their amusing aspects. In one family partnership case the agreement was drawn with the name of the new partner left blank —awaiting his momentarily expected birth so that name and sex could be inserted. Traditionally a nurse in the hospital is assigned to immediately announce the event to the male parent. In this case two nurses were delegated, the second to advise the impatient law clerk. *Redd v. Commissioner*[1] involved a partnership of husband, wife and four children, ages seven, five, two, and three months. The partner-wife testified on cross examination as follows:

Q. "Do you participate in the management of the business?"

A. "Well, I have been producing partners."

Q. "Beg your pardon?"

A. "I have been too busy producing partners so far."[2]

Lifetime Exemption and Marital Privileges

In general gifts to infants do not present any problems different from those encountered in gifts to adults except for the difficulties that arise from the "present interest" requirement, if the annual gift tax exclusion is to be obtained. Gifts to infants are clearly chargeable against the $30,000 lifetime exemption. They qualify for the gift-splitting provision of the Code if the donor is

1 5 T.C.M. 528 (1946)
2 *Ibid.*

married and his spouse consents. If the infant donee is married and the donor is her spouse, the gift tax marital deduction is available. The peculiar problems arise with respect to the $3,000 annual exclusion and the present discussion will be largely limited to this aspect of gifts to minors.

Annual Exclusion

The exclusion is denied if the gift is one of a future interest in property. This means that to qualify the gift must be to a specific identifiable person who has an immediate right to possess and enjoy the property. It is not enough that the interest is immediately and indefeasibly vested. It must be presently usable. Thus a remainder interest will not qualify, even though it has a present value. It is not subject to immediate possession and enjoyment, in the required sense, though obviously it may be presently sold, mortgaged or disposed of by gift or will. There is the further requirement that the interest must be capable of valuation.

Outright Gifts

No difficulty has been encountered with respect to outright gifts, though it is difficult to understand how an infant of three

can possess and enjoy a $1,000 bill, for example. But Rev. Rul. 54-400 states: "An unqualfiied and unrestricted gift to a minor, with or without the appointment of a guardian, is a gift of a present interest."[3] There are, however, practical objections to outright gifts to minors. United States savings bonds may be purchased for minors and they may redeem them. Cash may be kept in a *dry* trust in a savings account in the name of the parent for the minor. Beyond that, difficulties arise. Brokers are reluctant to deal in securities owned by minors. They are properly fearful of a successful suit if a stock is sold and subsequently rises in value. This is because of the minor's right to disaffirm. Titles are, to a large

[3] 1954-38 Int. Rev. Bull. 13.

extent, frozen. The minor's signature to a deed of real estate gives the buyer no assurance of permanent title. Of course, the appointment of a legal guardian will avoid these objections. But guardianship laws are more rigid than the powers that may be conferred upon a trustee. The guardian must generally post bond; he must account periodically to the court; in addition, the sureties on his bond will exercise a supervisory control. Generally, donors will be well advised to use the trust technique to obtain a reasonable degree of flexibility.

Gifts in Trust

A gift in trust, even if the life tenant or tenant for years is also the remainderman, is treated as partly a gift of a present and partly a gift of a future interest. Assume property is transferred to *A* for life, remainder to *B*, *A*'s interest, his life estate, is a present one. *B*'s interest, the remainder, is a future one. The value of the life estate will depend on *A*'s age, since it is measured by his life expectancy. Suppose *A* is fifteen, his present interest in a trust with a corpus of $10,000 is worth $7,600.

This rule, separating the gift into one of income and one of corpus, can lead to apparently absurd results. Suppose a trust is created to pay the income to *A*, age nineteen, for two years at which time the principal is to be distributed to him. Here the present interest, the right to the income for two years, has a value of $752. If he were to receive the income for fifteen years and then the corpus, the present interest would be worth $4,400. Obviously a gift with the right to the corpus in two years is worth much more to the donee than if he is to receive the corpus only after fifteen years, but the amount of the exclusion for the more valuable gift is very, very much less. The less valuable gift to *A* gets the full exclusion, the more valuable one, only 25% of the exclusion.

Discretionary Powers Over Corpus

Prior to the 1954 Code even more absurd results were reached. Assume a trust under which the income was to be paid to the minor for life with the sensible provision that the trustee might encroach upon principal in his discretion for the benefit of the minor. The cases denied the exclusion *in toto* because it was said to be impossible to value the present interest. The trustee might advance the entire principal to the infant the day after the creation of the trust. Hence no certain value could be attributed to the life estate. It would have no value at all, if the corpus were distributed the day after the gift. Of course everyone knew this wouldn't happen. But since no precise value could be given to the income interest, the full exclusion was forfeited. Happily Congress has overruled these cases by providing that the possibility that the life interest may be diminished shall be disregarded if the discretionary power can be exercised only in favor of the income beneficiary.[4]

[4] Int. Rev. Code of 1954, § 2503 (b).

Discretionary Powers Over Income

If the trustee is authorized to accumulate or distribute income, the gift of the income, apart from special statute to be referred to below, is a future interest since the minor has no immediate right to possession and enjoyment. He may enjoy only if the trustee decides to make a distribution. Meanwhile he has no present rights whatever. For the same reason, no exclusion is permitted for the typical sprinkle or spray type trust wherein the trustee is authorized, for example, to pay the income in whole or in part to either child *A* or child *B*. Here, again, neither child has any present right to anything.

Power To Withdraw Corpus

To constitute a present interest, the donee's right must be absolute and immediate and the measure of the value of the interest is the value of that right. A mandatory direction to pay income to *A* will constitute a present interest in the income. For this reason, any trust of substantial amount for an infant will obtain the exclusion if the minor is given the right to the income for life or for any considerable number of years. But suppose the corpus is limited to $3,000 or $3,000 is added to an existing trust. Because either such gift is partly present and partly future, something less than the full exclusion will be allowed. To avoid this limitation draftsmen provided in many trusts that the infant should have the immediate and absolute right to withdraw the capital.[5] This privilege obviously gave the right to immediate possession and enjoyment of the entire principal. Some courts have recognized that this power gives the infant the equivalent of outright ownership. Other courts have taken the position that as a practical matter an infant of three years cannot make a demand and that if he did, the trustee would undoubtedly refuse to honor it. Of course, a guardian could make the demand for the infant. But what if no guardian had been appointed at the date of the creation of the trust? Is it a future interest because it will take time to effect the appointment? It seems absurd to make the result turn on the existence of a guardian, since in none of these cases is there any real likelihood that the power will ever be exercised during minority. At best, the case law is confused and uncertain.

[5] Kieckhefer v. Commissioner, 189 F.2d 118 (7th Cir. 1951).

The 1954 Code Provision

The 1954 Code makes it possible to obtain the exclusion by a gift in trust to an infant, if the donor is willing to meet the requirements of the statute. Section 2503 (c) provides that a gift to a minor shall not be considered a gift of a future interest if:

1. The income and principal may be expended by or on behalf of the beneficiary; and
2. To the extent not so expended will pass to him at the age of twenty-one, or if he dies prior to that time to his estate or to his appointees under a general power of appointment.

Under this statute, the trustee may accumulate the income in his discretion, but the entire fund (capital and accumulated income) *must* be distributed to the infant at age twenty-one. It is unfortunate to require that the capital be forced upon the infant at majority. This may be the worst thing that could happen to him. Normally, donors do not direct termination of trusts at twenty-one, particularly when the beneficiaries are so young at the time of the gift that no one can possibly foresee the kind of persons they will be at that age.

It is regrettable that Congress did not make the age thirty. Another objection to complying with the statutory requirements is that if the infant dies prematurely, the funds will pass in whole or in part to the parent, since by the law of most states, infants may not execute valid wills, at least until they attain an age very close to majority. Now, in many cases, one of the main reasons for these gifts to minors is to keep the funds out of the estates of the parents.

If, however, the client wants the exclusion, it is better to follow the statute rather than to make outright transfers or to rely on the existing case law. The outright gift will cause difficulties if it is later desired to deal with the property in any way, while the donee is still under age. The pre-1954 technique of giving the unlimited withdrawal power permits the naming of beneficiaries to take on the premature death of the infant and thus can effectively keep the property out of the estate of the parent. Further, the property is not forced into the lap of the child at age twenty-one, though it is his for the asking. Query: if either of these very nebulous advantages is worth the uncertainty? The donor using this method is in fact "buying" a law suit that may prove far more costly than foregoing many exclusions. Here is a typical clause that will satisfy the requirements of the statute:

> "The trustee shall have the sole discretion to distribute income to, apply for the benefit of or withhold income from, my grandson, George, as well as sole discretion to distribute corpus to, apply corpus for the benefit of, or withhold corpus from my grandson, George. Any income and corpus not previously distributed to or applied for the benefit of George shall be distributed to or applied for the benefit of George shall be distributed free of trust to him at age 21 or to his estate or to such person or persons including his estate or the creditors

of his estate, as he may appoint by his Last Will and Testament, in the event of his death during his minority."

THE STOCK EXCHANGE ACT

While the statute removes the tax uncertainty of gifts in trust, donors objecting to the expense involved in setting up small trusts sought a substitute that would avoid the trust expense but achieve the benefits of the management and investment characteristics of a trust. The New York Stock Exchange attempted to furnish the answer to this problem by a proposed model law concerning gifts of securities to infants. This law has been adopted in California, Colorado,[6] Connecticut, Georgia, New Jersey, North Carolina, Ohio and Wisconsin. It provides for registration of a stock certificate by a donor in his own name or in the name of any adult member of the minor's family "as custodian for ————————————, a minor" with delivery of the certificate to the custodian.

To qualify the gift for the exclusion the Act provides in Section 3 (a):

> The custodian shall hold, manage, invest and reinvest the property held by him as custodian, including any unexpended income therefrom, as hereinafter provided. He shall collect the income therefrom and apply so much or the whole thereof and so much or the whole of the other property held by him as custodian as he may deem advisable for the support, maintenance, education and general use and benefit of the minor, in such manner, at such time or times, and to such extent as the custodian in his absolute discretion may deem suitable and proper, without court order, without regard to the duty of any other person to support the minor and without regard to any other funds which may be applicable or available for the purpose. To the extent that property held by the custodian and the income thereof is not so expended, it shall be delivered or paid over to the minor upon the minor's attaining the age of twenty-one (21) years, and in the event that the minor dies before attaining the age of twenty-one (21) years it shall thereupon be delivered or paid over to the estate of the minor.

Many donors, adopting programs of small annual gifts, are using this device without appreciating the possible pitfalls that may be present. Nor are those taking advantage of it limited to residents of states in which the law has been enacted. A number of lawyers, representing mutual funds and companies whose stock is widely held for investment, have expressed the opinion that a resident of State *A* (which does not have the law) may make a gift to an infant, also a resident in State *A*, of stock in a company incorporated in State *B*, which does have the law, by sending the certificate to State *B* for transfer under the provisions of the Act. The basis of these opinions is that, under general conflict of law principles, the validity of a gift will be sustained if it is valid by the law of any state having a substantial connection with the transfer.

[6] Colo. Rev. Stat. Ann. § 125-5-1 to 12 (1955 Supp.).

DOES A TRANSFER UNDER THE ACT QUALIFY FOR THE EXCLUSION ?

The Internal Revenue Service has ruled, by letter ruling, that it does. But the Service has been known to reverse its position, particularly where the original analysis may prove faulty and when a reversal will result in increased revenue collections. Is such a gift, in view of the broad language of the Act, for the exclusive benefit of the infant or is it for the benefit of the parent *or* the infant in the discretion of the custodian?

Let us examine a transfer where the tax results seem clear. Grandfather transfers property to Son, as trustee, to use the income and principal, in his discretion, to pay the interest and principal of Son's mortgage or to pay income and principal to Grandson or to retain and accumulate them for later use for either of these purposes. I suppose all would agree that on Son's death any remaining capital will be part of his tax estate. He has a general power of appointment over the fund since at any time during his life he may freely appoint the property for his own benefit. Suppose the authority is to discharge his support obligation instead of paying off his mortgage. In the absence of specific statutory provisions, the income would be taxable to him, whether he used it for his benefit or not. This statement requires a word of explanation. In the *Stuart* case[7] the Supreme Court had held that where

[7] Helvering v. Stuart, 317 U.S. 154 (1942).

the grantor of a trust, as trustee, had the power to use the income for the support of his dependents the entire income was taxable to him, whether so used or not. Congress overruled this decision by limiting the amount taxable to him to the amount actually so used.[8] The 1954 Code now provides that where a person, other than the grantor, has the power to vest the income or principal in himself he shall be taxable on all the income except that, if this power is limited to use for support of dependents, only the amount so used shall be taxable.[9]

Now, assume a transfer from Father to Son, as custodian under the Act, for Grandson. May not the gift be held to be for the benefit of Son *or* Grandson, as Son decides. If so, he has a general power of appointment. Under the cases,[10] it is well settled that where Father creates a trust for Son but gives Mother an absolute power of withdrawal (in order to assure some parental control) that (1) the income will be taxed to Mother, (2) if she fails to exercise her power to withdraw and permits the income to be paid to Son, she will be treated as having made a gift of the income to Son, (3) on her death the remaining corpus will be part of her estate. These cases regard Mother as the real donee.

Would it be surprising to have the Internal Revenue Service reverse its letter ruling and hold that, in the assumed transfer from Father to Son, as custodian, that Son was the real donee? If the exclusion is for the Son, then there will only be one, even if there may be several grandchildren who were thought to be the donees.

Can these possible pitfalls be avoided if the custodian is one who has no legal obligation to support the infant? Then he would have only a special power and the income and estate tax problems suggested would vanish into thin air. But what of the exclusion problem? Suppose property is transferred to *X*, as trustee, to expend the income and principal for the payment of Son's mortgage or for distribution to Grandson or for accumulation for such later payment or use, as the trustee may determine. Here, Son and Grandson are discretionary beneficiaries. This is the typical sprinkle type trust. No exclusions are allowable here. None is allowable for Son since he may in fact never enjoy any part of the gift. The same is true as to Grandson.

If instead of discretionary authority to discharge Son's mortgage, the authority is to discharge his support obligation is he not equally a discretionary beneficiary, *if* the trustee's power is "without regard to the duty of any other person to support the minor and without regard to any other funds which may be applicable or available for the purpose"?

The objection to the Act is that it goes beyond anything required by the code section. It is certainly doubtful if, under trust law, a trustee, without express authority, may pay out income for the support of a minor without regard to the beneficiary's other

8 Int. Rev. Code of 1954, § 677 (b).
9 *Id.* § 678(c).
10 *E.g.*, Richardson v. Commissioner, 121 F. 2d 1 (2d Cir. 1941).

means of support.[11] The trustee must act in the best interests of his beneficiary, not in the best interests of the parent. Can it be in the best interests of the minor to use his own funds, if the parent has adequate funds for support?

Trusts Under the Code

The typical trust will avoid these objections by using the traditional language giving discretionary power to use income and capital and still come squarely within the language of the code section. The trust expense should not be a deterrent if a program of annual giving is planned, since the initial trust may serve as the vehicle to receive the gifts made in all the later years. Further, these trusts will grow to substantial size so that banks may be expected to welcome them even though they are initially small in amount.

Selection of Trustee

The donor should not be the trustee or one of the trustees. If he is, the corpus will be taxed as part of his estate because of the power to "alter, amend, revoke or terminate." In the *Lober* case,[12]

11 Where a mother left property in trust for the support of her infant daughter until she should reach maturity, when the principal was to be paid to her, and after the mother's death the child was adopted, it was held that the trust fund should not be used to support her as long as the resources of the foster parents were sufficient for her support. In re Sylvester's Estate, 101 N.Y.S. 2d 804 (Surr. Ct. 1950).

12 Lober v. United States, 346 U. S. 335 (1953).

the grantor-trustee had created an irrevocable trust for his children. The income was to be paid to the children until they reached a certain age at which time they were to receive the principal. The only retained power was one to advance principal to them from time to time in the discretion of the trustee. Since the grantor as trustee could accelerate the termination date, he was held to have retained power that came squarely within the section requiring the inclusion of the property in his estate.

Short Term Trusts

It is not possible to qualify the short term trust for the 1954 Code's statutory exclusion for minors since these trusts contemplate the return of the capital to the donor at the end of the ten-year term. But short term trusts offer atractive opportunities for tax savings, without sacrificing the exclusion if the amount placed in the trust is at least $10,000 and the income is directed to be paid to the beneficiary. The transfer of $10,000 to a trust, income to be paid to *A* for ten years, corpus to revert to the grantor at the expiration of the period, will constitute a gift of the right to income for ten years. The value of such a right is equal to about 30% of the value of the prinicipal amount. In the case suggested, the value of the income interest is about $3,000.

Assume a married donor who is in a 60% income tax bracket. He has three children. Since he may use his spouse's exclusions, with her consent, he may create three trusts, one for each of the children, each in the amount of $20,000. Assuming the $60,000 produces 4%, he will lose gross income of $2,400 and net income, after taxes, of $960. Each child will have $800 of gross income, but an exemption of $600 and a standard deduction of $80. Thus, only $120 will be subject to tax. The combined taxes for the three children will amount to only *$72,* instead of *$1,440,* a saving over ten years of $13,368. Nor will the parent lose his exemption of $600 for each child if the children are under nineteen years of age.[13]

Long Term Trusts

Frequently, too much attention is paid to keeping within the

[13] Int. Rev. Code of 1954, § 151 (e).

exclusion. We have seen there are practical disadvantages to meeting the requirements of the 1954 Code. Further, the short term trust will be attractive only in a limited number of situations. Most donors will desire to remove the capital from their taxable estates, which the short term trust fails to do. Perhaps the most sensible approach is to create long term trusts that fall outside the statute and still obtain the exclusions by gifts of slightly more than the $3,000 or, in the cases of married persons, $6,000.

Assume our donor is married and that the prospective donee is age ten. A gift of $8,000 in trust requiring the trustee to pay the income to the infant for life, with power to encroach upon capital for his benefit, will constitute a gift of a present interest of $6,124. Thus the exclusions of the donor and his spouse will be obtained and, as they will split the gift, the amount of the excess, slightly under $2,000, will reduce the lifetime exemptions of each by less than $1,000. The gifts could be continued at the same rate for several years with the same results since the value of a life estate at such early ages diminishes each year at a negligible rate. This seems a far more sensible way of obtaining the exclusion than meeting the statutory requirements. But suppose the lifetime exemptions of the donor and his spouse have already been exhausted. Well, donors ought to be willing to pay something for the estate and income tax benefits that such gifts obtain. After all, one can't have everything free. Assume the donor is in a 30% estate tax bracket and a 60% income tax bracket. The gift of $8,000 will eliminate $2,400 of estate tax and the income it produces over the years will be taxed at 20% instead of 60%. This should be worth a few dollars of gift tax. Remember, only $2,000 of the $8,000 will incur tax and the beginning gift tax rates are not too high.

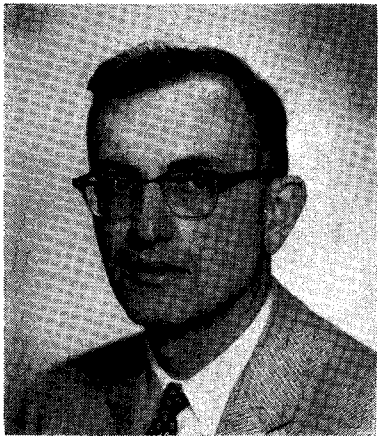
GIFT TAX RATES IN THE LOW BRACKETS[14]

Net Gift	*Tax*	*Rate on Excess*
$ 1,000	$ 22	2¼%
5,000	112	5¼%
10,000	375	8¼%
20,000	1200	10½%
30,000	2250	13½%

[14] Id. § 2502.

DAMAGES FOR DEATH – LIMITED OR UNLIMITED?

By Richard D. Hall



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With the convening of the 35th General Assembly, the revision of the present $10,000 maximum limit on recovery in a death action in Colorado will undoubtedly be proposed and seriously considered. It therefore seems appropriate to inquire at this time into the nature of the Colorado Death Act and the reasons giving rise to the statutory limit on recovery.

The present statutory law regarding damages recoverable in death actions is found in Section 41-1-3, Colorado Revised Statutes 1953, and is in substantially the same form as when originally enacted in 1877,[1] except for the raising of the maximum recovery figure in 1951 from the original $5,000 to a maximum of $10,000, and a provision requiring a plaintiff to elect between the penal section of the death act relating to common carriers and the section relating to death caused by negligence by persons in general.[2] Such section provides in part as follows:

> "in every such action the jury may give such damages as they may deem fair and just, not exceeding ten thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."[3]

The cause of action created by our death act has been held by the Colorado supreme court to be a separate and new action, and not a survival of the cause of action held by the deceased prior to his death.[4] This holding appears to be in conformity with the

1 Colo. Sess. Laws 342 (1877).
2 Colo. Sess. Laws c. 148 § 3 (1951).
3 *Ibid.*
4 Fish v Liley, 120 Colo. 156,.208 P.2d 930 (1949).

rulings of courts in other jurisdictions. As the action is created by the death act itself, the court has noted that the elements of damage are essentially different from those proper for consideration in the personal injury action to which the deceased would have been entitled if the death had not occurred.[5]

The various types of death acts have been classified into three categories: (1) The more usual form of statute, whose purpose is to compensate the survivors for the benefits which they would have derived from the earning power of the deceased if his life had not been cut short. (2) The type of death act whose purpose is to enable the survivors to recover a sum determined by the gravity of the defendant's fault in causing the death. (3) The type of death act in which the recovery is treated as if the cause of action were an asset of the deceased, and as if the decedent's cause of action was in effect surviving to his representative.[6] Our supreme court has always held that the recovery by the survivors under our present death act is purely compensatory in nature and does not allow any penal or punitive damages.[7] It is interesting to note that the first Colorado Death Act, passed in 1872[8] vested the cause of action in the personal representative of the deceased, and prescribed absolutely no rule as to the measure of damages. This 1872 Act, during the brief five years of its existence, was construed in effect to be the third type of Act, with the determination of the amount of damages left almost completely up to the jury, which had the right also to assess punitive damages.[9]

SURVIVING PARTIES

The language of the statute indicates that the damages must be measured by the "necessary injury" to the surviving parties who may be entitled to sue. The word "injury" is obviously not used in its ordinary sense, but in this context has a broad meaning synonymous with "loss" or "damages." As the word "injury" was used in the original death act known as Lord Campbell's Act, passed in 1846 in England, the use of such word in our Colorado statute appears to be one of those historical carry-overs of language that no longer conveys the same meaning as when originally used.

The Colorado act provides that the suit under the death act may be brought by the husband or wife of the deceased, but further provides that any judgment obtained in such action shall be owned by such persons as are the heirs at law of the deceased under the laws of descent and distribution, and shall be divided among such heirs in the same manner as real estate is divided according to the statute of descent and distribution.[10] Accordingly, where a husband is killed in an accident, the question arises as to whether the measure of damages should be the compensation of the widow who

5 *Id.* at 160, 208 P.2d at 932.
6 Restatement, Torts § 493 (1934).
7 Pierce v. Connors, 20 Colo. 178, 182, 37 Pac. 721, 722 (1894); Hayes v. Williams, 17 Colo. 465, 30 Pac. 352 (1892); Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348 (1892).
8 Colo. Sess. Laws 117 (1872).
9 Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442 (1874).
10 Colo. Rev. Stat. Ann. § 41-1-1 (1953).

alone brings the suit, or should also include compensation for the children of such widow who will share in the recovery but who are not "entitled to sue." A similar question would arise if the surviving widow failed to sue within one year after the death of her husband and during the second year her children filed such suit. In such case the statute is unclear as to whether the widow would share in any way in the recovery, and is similarly unclear as to whether the measure of damages in such a suit would be the loss on the part of the children, or the loss on the part of both the children and the widow. These issues have not been decided by our supreme court. However, in the case of *Phillips v. Denver*

Tramway Co.,[11] the Colorado supreme court did review a judgment in favor of the Denver Tramway Company where the father and mother of a deceased child brought suit under the death act. The supreme court held that contributory negligence on the part of the father was no bar to recovery by the mother of her one-half interest in the death act claim. This decision, accordingly, would tend to indicate that the damages under a death act suit should be separately ascertained for each plaintiff.

INJURY

The "necessary injury" resulting from the death under our Colorado death act has uniformly and repeatedly been held to be the sum equal to the net pecuniary benefit which the plaintiff might reasonably have expected to receive from the deceased if the life of the deceased had not been terminated by the negligent act of the defendant.[12] In a long line of decisions, the court has also specifically stated that the Colorado act does not permit recovery of any exemplary or punitive damages under its terms, or recovery for the sorrow and grief of the plaintiffs, nor for their loss of the society and companionship of the deceased.[13] Our supreme court has not specifically considered whether the loss of the personal care, training and instruction of a parent would be considered a "pecuniary benefit."

The form of the jury instructions to be given in accordance with the above mentioned law has given the court no particular difficulty, and specific instructions have been approved by the Colorado supreme court.[14] However, where the plaintiffs have been parents recovering for the loss of a child, the court has been faced with the problem of the lack of any specific evidence of any net pecuniary loss to the parents by reason of the child's death. Accordingly, on general legal principles, such judgments in favor of the parents would seem to be open to challenge by way of a motion for a directed verdict, or a motion to set aside any such judgment as excessive under the evidence. This point was raised in the case of *St. Luke's Hospital Association v. Long*,[15] and the Colorado supreme court disposed of the problem as follows:

> "There was testimony that the boy was in good health and the Court sustained objection of defendant to further evidence along that line. It is impossible to establish with any definiteness or certainty the future earning ability of a three-year-old boy or his future generosity toward his parents. To hold that no recovery could be had in the absence of such showing would be in effect to abolish the right to recovery by parents of young children and such was not, we think, the Legislative intent in the enactment of the statute."[16]

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11 53 Colo. 458, 128 Pac. 460 (1912).
12 Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951); Pierce v. Connors, 20 Colo. 178, 37 Pac. 721 (1894).
13 *See e.g.*, McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953); Lehrer v. Lorenzen, *supra* note 12.
14 *E.g.*, McEntyre v. Jones, *supra* note 13; St. Luke's Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Lehrer v. Lorenzen, *supra* note 13.
15 *Supra* note 14.
16 125 Colo. at 33, 240 P.2d at 922.

The court, in the *St. Luke's Hospital Association* case, thus affirmed a verdict and judgment for $5,000 in favor of the parents of a three-year-old boy, where the evidence showed merely that the boy was in good health but nothing more as to his future earning ability, or the cost of supporting and educating him until the completion of his schooling. Under similar reasoning, the Colorado supreme court has affirmed a verdict and judgment in the sum of $7,500 in the favor of the parents of a thirteen-year-old girl,[17] and a verdict and judgment in the sum of $10,000 in favor of the parents of a nine-year-old daughter.[18]

In all three of these cases it is most evident that there was no proof of any net pecuniary loss to the parents at all approaching the amounts of the respective verdicts and judgments, even if the alleged value of the services of the deceased children during their minority were to be included in the figure. However, the Colorado supreme court would undoubtedly have been subject to much criticism if it had literally followed the wording of its own decisions and applied the same rules of evidence and requirements of proof to the death actions as it has in other cases, for there most certainly is a general feeling that parents are entitled to recover something for the intense grief and sorrow resulting from the loss of a child even though no specific pecuniary loss is actually proven.

Whatever the reasons or basis for such holdings, we do have a situation in the state of Colorado where the jury instructions limit the amount of the verdict to net pecuniary loss on the part of the parties entitled to sue, but verdicts far in excess of any net pecuniary loss proven by the parties are, without exceptions, upheld by the courts as not excessive under such jury instructions. The practical effect, of course, is to permit some recovery for sorrow, grief, and loss of companionship while the language of the supreme court decisions expressly forbids such a recovery. Every practicing lawyer who has defended death act suits, particularly suits by parents, is well aware that the net pecuniary loss in such an action is almost unimportant, and that the reason juries in such cases tend to bring in substantial verdicts is their desire to compensate the bereaved parents for the sorrow arising from the loss of their child.

MAXIMUM LIMIT OF RECOVERY

Various reasons have been given for the existence of a statutory maximum limit to recovery under the death act. Some are historical in nature, arising from the fact that the death act created an entirely new cause of action. The modern reasons given for such a limit are (1) the difficulty of measuring damages arising by reason of the wrongful death of a person, and (2) the possibility of extreme awards being made by juries due to the strong feelings of sympathy aroused by such cases.[19]

17 McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953).
18 Dawkins v. Chavez, 132 Colo. 61, 285 P.2d 821 (1955).
19 16 Am. Jur. 123, *Death* § 184 (1938).

Before considering these stated reasons, it might be well to restate what to the writer is the fundamental and basic test as to the reasonableness or unreasonableness of such a statutory limitation; i.e., whether or not such a limitation is fair and just to both the plaintiff and the defendant. It is submitted that in the consideration of that question, the economic effects of raising or eliminating the present $10,000 statutory limit of recovery under the Colorado death act should not be allowed influence. Among the economic effects which would follow the raising or elimination of the statutory limit, and which would have a tendency to influence one or more groups of voters, are the following:

(1) Liability insurance companies would pay out more money to individual plaintiffs, and thereby some "poor" people would be helped.

(2) The loss ratios of the liability insurance companies would tend to increase, thereby reducing their profits.

(3) Plaintiffs would tend to recover larger verdicts and judgments in death cases, thereby enabling plaintiffs' attorneys to secure larger fees.

(4) The higher verdicts and judgments in death cases would tend to increase the loss ratios of liability insurance companies to an extent which possibly could result in higher automobile insurance premiums for policyholders.

The elements of special damages provable in a death act case certainly present similar problems of proof to those present in personal injury cases. Thus the proof of such items as loss of financial support, funeral expense, loss of services, and loss of prospective gifts or inheritance can presumably be as readily ascertained under the evidence by a jury as are similar items of damages in personal injury cases. However, when we come to the elements of grief, sorrow, mental shock, and loss of companionship and society of a wife, husband or child, we are faced with elements of damages which theoretically are not permitted under our Colorado law and regarding which no evidence can be or is produced in court for the jury to consider. The general rule in Colorado is that mental anguish alone, not arising from any physical injury to the plaintiff

himself and caused solely by simple negligence, is not a basis for an action for damages.[20]

However, as we have seen, in practice the items of grief, sorrow, mental anguish, and loss of companionship are the items which actually cause the verdicts in suits under the Colorado death act to be substantial even in cases where the special damages are very low.

The difficulties inherent in any determination of the amount of loss due to grief, sorrow, or mental anguish are aptly noted in the early decision of *Kansas Pacific Ry. Co. v. Miller*,[21] where the Colorado supreme court observed:

> "It seems to be settled that no damages can be recovered for the suffering which precedes the death. The grave bars out this right; upon what known principle can the mental sufferings of the survivors be estimated. If the family is large, and the grief proportional to its size, then the damages would be immense. If the family was small, but the grief were boundless, how could it be compassed. How could a jury estimate the relative mental anguish of a widow and twelve children. Furthermore, it would involve a minute scrutiny into the personal relations of all parties. Affection would have to be measured by a graduated scale. An account would have to be taken of the familiarity which existed between the deceased and the survivors.
>
> "If a confirmed drunkard, or a person of vile associations, the grief at his departure might not be so poignant.
>
> "If the widow had wearied of her lord, or the husband of his wife, death might be a joy instead of an anguish. How determine the duration of this mental suffering or the degree of its intensity? When a large number of survivors were found, an inquiry would have to be instituted into the feelings of each. This certainly might, in many instances, tend to scandals and disgrace. Neither the interests of the litigants nor the policy of the law could be subserved by such a course. None of these difficulties are encountered in estimating the mental suffering in the case of one suing for direct injuries to himself;

[20] Johnson v. Enlow, 132 Colo. 101, 286 P.2d 630 (1955).
[21] 2 Colo. 442 (1874).

his relations to others are in no sense material; it is a personal, not a relative, suffering."[22]

If some allowance is to be made in damages for such mental anguish, grief, sorrow and loss of companionship on the part of the survivors of the deceased, the allowance should be fixed or controlled in some manner by statute, and not left up to a jury to set on the basis of their emotions and sympathies and without any relation to any legal evidence, evidence on these items being completely inadmissable even if offered.

In attempting to work out some reasonable and not completely arbitrary solution to this unique problem, it seems apparent that plaintiffs under the death act should be divided into two categories, based upon the amount of special damages provable by them. Thus, the widow or minor children of a deceased, in every case, have very high provable special damages in the form of loss of substantial financial support. The present $10,000 maximum limitation on recovery for such parties appears most unjust as their special damages usually amount to far more than that figure independent of any allowance whatsoever for mental anguish, grief, sorrow or loss of companionship. However, adult and self-supporting children suing by reason of the death of a parent, parents suing for damages by reason of the death of a child, and a widower suing by reason of the death of his wife in most cases have very little in the way of provable special damages. Such plaintiffs are actually basing their re-

[22] *Id.* at 465.

covery almost entirely on the grief, sorrow, mental anguish and loss of companionship elements of damage, and a statutory limit of $10,000 as regards such plaintiffs does not appear to the writer to be at all unreasonable.

In that connection, we must also consider the equities as regards the defendant, who must either personally or through his insurer, pay such judgments. Any practicing attorney who has participated in a suit involving a claim under the death act is well aware that this type of action arouses the most intense sympathy on the part of the jury for the bereaved parent, widow, or other relative. After a photograph of the deceased has been shown to the jury, and the surviving widow or parent while testifying from the witness stand has broken into tears because of reliving the tragic accident, the emotional factor becomes so great that an unfairly high verdict is all too apt to result. No matter what the size of the verdict, under such conditions it is indeed difficult for it to be based upon a calm and rational approach, and in this respect this type of action is, in the writer's opinion, quite different from a personal injury action.

CONCLUSION

It is the earnest hope of the writer that the unfair and unjust $10,000 death act limitation as applied to widows and minor children will soon be raised to a reasonable and just figure by the General Assembly. It is also the earnest hope of the writer that the General Assembly will not go to the extreme of eliminating all death act limitations as to maximum recovery, and that the General Assembly will leave substantially unchanged the present $10,000 maximum recovery limitation as regards suits by adult children for deaths of parents, parents for deaths of children, or widowers for loss of wives because this limitation as applied to these plaintiffs appears to be reasonable in view of the lack of any substantial special damages provable by such plaintiffs.

NOTES AND COMMENTS

What Is A Life Worth?

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The State of Colorado by law declares that no life is worth more than $10,000.00. Section two of Colorado's wrongful death statute defines wrongful death,[1] and section three provides,

> "and in every such action the jury may give such damages as they deem fair and just, not exceeding ten thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default."[2]

At common law there was no civil remedy against one who tortiously caused the death of another; the wrongful death action is purely a creature of statute. Death acts have been adopted by all of the states and although the statutory regulations in regard to damages are distinctive in each jurisdiction, all of the wrongful death statutes are modeled upon the first law of this type, Lord Campbell's Act, adopted in England in 1846.[3]

The first Colorado statute to authorize wrongful death actions was unanimously enacted by the 1872 session of the territorial legislature.[4] That act did not limit the amount which might be recovered as damages in death cases.[5] However, in 1877 the law was revised to read almost as it does today and to add a provision limiting damages recoverable to a maximum of $5,000[6]. The 1877 statute

1 Colo. Rev. Stat. Ann. § 41-1-2 (1953).
2 *Id.* § 41-1-3.
3 Stat. 9, 10 Vict. c. 93 (1846).
4 Colo. H. Jour. 9th Sess. (1872).
5 Colo. Sess. Laws 342 (1872).
6 Colo. Sess. Laws c. 877 §§ 1-3 (1877).

further provided, as does the present law, a minimum recovery of $3,000 applicable only where the death was wrongfully caused by a common carrier.[7] How much support these original limits had will probably never be known since, according to the Library of Congress, there were no legislative journals printed for the first session of the Colorado General Assembly of 1877. The $5,000 limitation remained unchanged until 1951 when the General Assembly raised the maximum damages to $10,000.[8] This act, House Bill No. 78, was introduced on January 18, 1951, and assigned to the Judiciary Committee. It was reported favorably from this committee and passed without opposition in the House or Senate.[9] If there were attempts either to raise the maximum figure provided by the bill, or to oppose raising the $5,000 limit, they were confined to committee sessions.

Colorado is by no means the only American jurisdiction to restrict damages recoverable for wrongful death by the device of a statutory maximum limit. Thirteen sister states,[10] and Alaska[11] have similar limitations, but only Maine[12] has a ceiling as low as that in Colorado. Even Maine, with its $10,000 general limitation on damages for wrongful death, must be considered more liberal than Colorado in this regard; for the Maine statute allows recovery of reasonable medical, hospital and funeral expenses as well as damages for conscious suffering prior to death, all in addition to the basic $10,000 maximum for the wrongful death proper.[13]

Indiana limits recovery in wrongful death actions to $15,000, and if there is no surviving spouse, dependent child, or dependent next of kin, to $1,000 for hospital services, $1,000 for medical services, $1,000 for burial expenses, and $1,000 for administrator's expenses and attorney's fees.[14] New Hampshire limits damages to

7 *Id.* § 1.
8 Colo. Sess. Laws, c. 50 §§ 1-3 (1951).
9 Colo. H. Jour. 38th Gen. Ass. (1951).
10 Ill. Rev. Stat. c. 70, § 1, 2 (Supp. 1955); Ind. Ann. Stat. § 2-404 (Burns, Supp. 1955); Kan. Gen. Stat. § 60-3203 (1949); Me. Rev. Stat. c. 165, §§ 9-10 (1954); Mass. Ann. Laws, c. 229, §§ 1-2 (Supp. 1953); Mo. Rev. Stat. §§ 537.070-80 (Supp. 1955); N. H. Rev. Stat. Ann. c. 556, §§ 9-13 (1955); Ore. Rev. Stat. § 30.020 (1953); S. D. Code, § 37.22 (Supp. 1952); Va. Code, § 8-633-636 (Supp. 1954); W. Va. Code Ann. § 5474-6 (Michil's Supp. 1955); Wis. Stat. § 331-.03-04 (1955).
11 Alaska Comp. Laws Ann. §§ 60-73 (1949).
12 Me. Rev. Stat. c. 165 §§ 9-10 (1954).
13 *Ibid.*
14 Ind. Ann. Stat. § 2-404 (Burns, Supp. 1955).

$7,500 unless the decedent left a widow, a widower, minor child or children, or dependent father or mother, in which case the maximum is $15,000.[15] In Wisconsin, where damages recoverable for wrongful death are also $15,000, a parent, husband or wife may in addition recover up to $2,500 for loss of society, and a widow with dependent children under fifteen years of age may recover $1,500 above the maximum for each child, but not exceeding a total increase of $7,500.[16] Minnesota courts may award up to $17,500 in a death action, as may the courts of Oregon.[17] South Dakota, West Virginia and Massachusetts have statutes limiting maximum damages to $20,000 in this type of action.[18] Massachusetts more strictly limits recovery against a common carrier to $15,000.[19] Damages of $25,000 are allowed in Kansas, Missouri, and Virginia.[20] Illinois allows $25,000 in damages, except that where no widow or next of kin survives the decedent, a substitute action may be brought by the executor or administrator for hospital, medical, and funeral expenses incident to the wrongful death, and up to $450 may be awarded for each such claim.[21]

Alaska in allowing up to $50,000 sets a higher maximum than does any state having a ceiling on wrongful death awards. In Alaska the action inures to the exclusive benefit of the widow, surviving husband and children of the decedent or, if none, to the children of the decedent's child or children, and the surviving parent or parents of the decedent.[22]

The other states, the territory of Hawaii, and the District of Columbia have no maximum limitations on damages recoverable in wrongful death actions. In fact the constitutions of Arizona, Arkansas, Kentucky, New York, Ohio, Oklahoma and Utah forbid limitation of damages for wrongful death.[23]

Only Massachusetts[24] and Rhode Island[25] seem to conclude that any life must be worth $2,000 or $2,500 by employing these respective minimum limits in death actions. Colorado's only minimum is the $3,000 punitive award in actions against common carriers.[26]

Not only is the wrongful death limit in Colorado the lowest in the nation, but Colorado is equally conservative in two other aspects of wrongful death litigation. First, although the statute authorizes suit by the decedent's husband, wife or "If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased . . . ,"[27] the

15 N. H. Rev. Stat. Ann. c. 556, §§ 9-13 (1955).
16 Wis. Stat. § 331.03-04 (1955).
17 Minn. Stat. § 573-02 (1953); Ore. Rev. Stat. § 830.020 (1953).
18 Mass. Ann. Laws c. 229, §§ 1-2 (Supp. 1953); S. D. Code § 37.22 (Supp. 1952); W. Va. Code Ann. § 5474.5-6 (Michil's Supp. 1955).
19 Mass. Ann. Laws c. 229, §§ 1-2c (Supp. 1953).
20 Kan. Gen. Stat. § 60-3203 (1949); Mo. Rev. Stat. §§ 537.070-80 (Supp. 1955); Va. Code § 8-633-636 (Supp. 1954).
21 Ill. Rev. Stat. c. 70, §§ 1, 2 (Supp. 1955).
22 Alaska Comp. Laws Ann. §§ 60-73 (1949).
23 Ariz. Const. Art. II, § 31; Ark. Const. Art. 5, § 32; Ky. Const. § 241; N. Y. Const. Art. I, § 16; Ohio Const. Art. I, § 19a; Okla. Const. Art. XXIII, § 7; Utah Const. Art. 16, § 5.
24 Mass. Ann. Laws, c 229, §§ 1-2c (Supp. 1953).
25 R. I. Gen. Laws, c. 477 § 1 (1938).
26 Colo. Rev. Stat. Ann. § 41-1-1 (1953).
27 *Ibid.*

words "heir or heirs" have been narrowly construed to restrict the right of action to lineal descendents if there is no surviving husband or wife.[28] Second, the statute itself provides that the action must be brought within two years after commission of the wrongful act rather than within two years after the death which gives rise to the cause of action.[29]

A more important consideration in regard to the subject of damages is the extreme conservatism of the Colorado supreme court in construing the statutory directive to consider "mitigating and aggravating circumstances attending" the wrongful act.[30] Even though the phrase "mitigating and aggravating circumstances" is ordinarily interpreted to authorize punitive or exemplary damages,[31] the Colorado court has limited wrongful death recoveries to actual or compensatory damages.[32] In 1892 the court decided that the degree of negligence and the intent involved in the commission of the wrongful act are not to be considered in determining the amount of damages to be awarded, that such damages are compensatory only, and that "the words mitigating and aggravating circumstances attending such wrongful act, etc. contemplate circumstances, not relating to the wrongful act itself, but such as affect the actual damages suffered by the surviving party entitled to sue, either by way of diminishing or enhancing the same."[33] These cases seem to be controlling even today.[34]

Colorado courts apparently have encountered trouble in determining the proper measure of damages for wrongful death ever since the enactment of the original wrongful death act of 1872.[35] In 1874 the Colorado Supreme court said:

> "in actions brought by one to recover for injuries sustained through the negligence or misconduct of another, mental anguish and sufferings are legitimate subjects for compensation. . . . (S)o, too, when the injury has been the result of wanton-

28 Hindry v. Holt, 20 Colo. 178, 37 Pac. 721 (1894).
29 Colo. Rev. Stat. Ann. §41-1-4 (1953).
30 *Id.* § 41-1-2.
31 Tiffany, Death By Wrongful Act § 139 (2d ed. 1913).
32 Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348 (1892); Hayes v. Williams, 17 Colo. 465, 30 Pac. 352 (1892).
33 Moffat v. Tenney, 17 Colo. 189, 198, 30 Pac. 348 (1892).
34 Fish v. Liley, 120 Colo. 156, 208 P. 2d 930 (1949) (leading wrongful death and survival case which referred to the 1892 cases cited in note 32 *supra*).
35 Colo. Sess. Laws 117 (1872).

ness, violence, or gross negligence, punitive damages have been awarded."[36]

Two years later the same court said that compensatory damages might be awarded under the 1872 statute and that there was also a right to exemplary damages where there was willful misconduct or entire want of care.[37] Then in 1878 the court stated, in deciding a case brought under the 1872 act, and heard by the appellate court after the passage of the 1877 act,[38] "Whatever may be said of the act approved March 7, 1877, the act of February 8, 1872, is not to be regarded in any proper sense as a penal statute."[39]

Since enactment of the 1877 act the courts have held that the sections in regard to common carriers are punitive but that those applicable to non-carriers are merely compensatory.[40] Thus in a 1914 interpretation of the provision for a minimum recovery against common carriers, the state supreme court reasoned,

> "The fact that no matter how young or old, how infirm or useless the deceased, the recovery for his death, under this provision is precisely the same, depending on the defendant's failure of duty, as it would be had he been in the prime of life, having the highest capabilities and attainments, mentally and physically, demonstrates with unerring certainty the purpose of the legislature to make it a punitory section pure and simple."[41]

In awarding damages for wrongful death in actions brought under sections other than the common carrier sections the court has held that a proper measure of damages for wrongful death is the pecuniary benefit which could reasonably have been expected to accrue to the person suing by the continued life of the decedent, as of grace and favor if not by right.[42] For example, the estimated future pecuniary benefit to parents of a deceased minor child before the child's majority and also during the parents' anticipated old age, constitute elements of compensable damages.[43] The court has denied recovery for the physical and mental pain, bodily disfigurement, and loss of time suffered by the deceased before his death as a result of the defendant's wrongful act, [44] and for grief and sorrow caused surviving relatives by the death.[45] It was said in an early case that ,"the recovery allowable is in no sense a solatium for grief of the living occasioned by the death of the relative or friend, however dear. . . . (T) his may seem cold and mercenary but it is unquestionably the law."[46]

36 Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442, 464-5 (1874).
37 Kansas Pac. Ry. Co. v. Lunden, 3 Colo. 94 (1876).
38 See note 6 *supra*.
39 Denver Ry. v. Woodward, 4 Colo. 162, 168 (1878).
40 See note 6 *supra*.
41 Denver & R. G. R. R. v. Frederick, 57 Colo. 90, 96, 140 Pac. 463 (1914); *accord* Myers v. Denver & R. G. R. R., 61 Colo. 302, 157 Pac. 196 (1916).
42 McEntyre v. Jones, 128 Colo. 461, 263, P. 2d 313 (1953); St. Lukes Hospital Ass'n. v. Long, 125 Colo. 25, 240 P. 2d 917 (1952); Molly Gibson Consol. Min. & Mil. Co. v. Sharp, 5 Colo. App. 321, 38 Pac. 850 (1894); Denver S. R. R. v. Wilson, 12 Colo. 20, 20 Pac. 340 (1888).
43 St. Luke's Hospital Ass'n. v. Long, supra note 42.
44 Lee v. City of Fort Morgan, 77 Colo. 135, 235 Pac. 348 (1926).
45 Pierce v. Conners, 20 Colo. 178, 37 Pac. 721 (1894); *accord*, Tehrer v. Tarenzen, 124 Colo. 17, 233 P. 2d 382 (1951).
46 Pierce v. Conners, supra note 45 at 182, 37 Pac. at 730.

In emphasizing that these non-carrier sections allow only compensatory damages the court has held that giving the jury instructions on damages which omit the caveat that an award is limited to pecuniary loss and is compensatory, constitutes reversible error.[47] The problem of adequately defining compensatory damages appears to trouble the courts today as it did in an 1884 personal injuries case where the court stated,

> "A misapprehension seems sometimes to exist as to the word compensatory. . . . (U)nder the rule limiting them to compensatory damages, juries will, with proper instructions, recognize a broad distinction between a tort unaccompanied by malice, or circumstances of aggravation or disgrace, and one producing equal direct pecuniary damage where either of these conditions exist. In the former case consider only the actual injury to the person or property, including expenses, loss of time, bodily suffering etc., occasioned by the wrongful act; in the latter, they allow such additional sum as in their judgment is warranted by the circumstances of contumely, anguish or oppression; but in both instances the damages are awarded as compensation; the additional sum is given to the individual as a recompense for the mental suffering, or wounded sensibilities, etc., as the case may be."[48]

That funeral expenses are a proper element of the damages to be recovered under the wrongful death act, within the ten thousand dollar maximum, is well established.[49] However, there seems to have been some conflict in regard to whether an action could be brought, separate from the wrongful death action, to collect for funeral costs. In a 1940 case, the Colorado court held that funeral expenses are a proper element of damages for wrongful death, but that they do not form the basis for a separate cause of action.[50] Yet the same court, in 1954, allowed the administratrix of an estate, where there were no "heirs" entitled to bring suit under the wrongful death act to recover in an action brought for funeral expenses,

47 Denver & R. G. R. R. v. Spencer, 25 Colo. 9, 52 Pac. 211 (1898).
48 Murphy v. Hobbs, 7 Colo. 541, 547-8. 5 Pac. 119. 123-4 (1884).
49 McEntyre v. Jones, 128 Colo. 461. 263 P. 2d 313 (1953); Dillon v. Sterling Rend. Works, 106 Colo. 407, 106 P. 2d 358 (1940).
50 Dillon v. Sterling Rend. Works, supra note 53.

on the theory that this was not an action for personal injury to the decedent, but rather an action to recover money of which the estate had been deprived.[51]

For many years the Colorado courts have sought to define clearly the proper relationship between the wrongful death statute and the survival statute. *American Insurance Company v. Naylor*,[52] a 1937 case, presents one of the more interesting situations litigated under the survival statute. The plaintiff Naylor, before commencing this action under the survival act, had recovered $4,000 under the wrongful death statute to compensate him for the wrongful death of his wife, caused by an agent of the defendant. The court held that such recovery did not preclude another action by the same plaintiff under the survival statute for medical expenses incurred after the accident but before his wife's death. In addition Mr. Naylor was awarded damages for the loss of his wife's services, companionship, and society during the three months between the wife's injury and death. In 1939 the court, in a second appeal of the same case, held that the loss of a wife's services and companionship to a husband and the money spent by a husband caring for the wife's injuries, occurring as a result of the defendant's wrongful act against the wife, constitute a personal injury to the husband for which he may recover, and awarded interest on the damages allowed in the previous case,[53] under the statute providing interest in personal injury tort actions.[54]

> The 1955 legislature amended the survival statute to read, "All causes of action, except for slander or libel and actions brought for the recovery of real estate, shall survive and may be brought or continued notwithstanding the death of the person in favor of or against whom such action has accrued, but punitive damages shall not be awarded nor penalties adjudged . . . in tort actions based upon personal injuries, the damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and ex-

51 Kling v. Phayer, 130 Colo. 158, 274 P. 2d 97 (1954).
52 American Ins. Co. v. Naylor, 101 Colo. 41, 70 P. 2d 349 (1937).
53 American Ins. Co. v. Naylor, 103 Colo. 461, 87 P. 2d 260 (1939).
54 Colo. Rev. Stat. Ann § 41-2-1 (1953).

penses sustained or incurred prior to death, and shall not include damages for pain, suffering or disfigurement, nor prospective profits or earnings after death. An action under this section shall not preclude an action for wrongful death under article one, chapter forty-one of the Colorado Revised Statutes."[55]

The amendment of the out moded survival statute has been favorably noted.[56] As yet there are no reported cases construing the amended statute, but it would seem that proper application of the new law would help remedy a few of the defects of the wrongful death statute, as well as give justice to those injured by a tort-feasor who dies before the injured party can be recompensed. It should now be possible for surviving relatives of a person wrongfully killed to collect in addition to a possible $10,000 for the wrongful death, all of the expenses occasioned by the fatal injury, and for an administrator, prohibited from suing under the wrongful death statute, to preserve the estate by suing under the survival statute. The worst defect of the wrongful death statute, the $10,000 maximum limitation on damages will, however, remain.

A life worth $10,000 in Colorado might be thought to be worth $300,000 by a jury in New York. In *De Vito v. United Airlines,*[57] the jury, in an action for wrongful death, gave an award of $300,000 which was reduced by the trial judge to $160,000. In California a jury might find the same life worth $200,000. In 1953 a California trial judge reduced a jury award of $200,000 to $150,000 in a wrongful death case.[58] A verdict of $150,000 was sustained by the United States Court of Appeals for the Second Circuit in a case in which the decedent was killed in a plane crash.[59]. In a 1952 New York case, the decedent was a thirty-nine year old brakeman survived by a thirty-one year old widow and five children. Out of the total award of $141,500, $116,500 was awarded for death, and $25,000 for conscious pain and suffering prior to death from the injuries sustained.[60] In two other New York cases, damages were $195,888 reducted to $100,000 in one,[61] and $165,000 in the other.[62] In an interesting California case, the decedent was a thirty-five year old army sergeant earning $330 a month who was survived by a thirty-five year old wife and a seven and a half year old child. The damages awarded were $100,000.[63]

Another high award case in New York was *Neddo v. New York,* in which a twenty-nine year old man earning $15,000 a year left a widow with a life expectancy of thirty-six years. The Appellate

55 Colo. Rev. Stat. Ann. § 152-1-9 (Supp. 1955).
56 Note, 28 Rocky Mt. L. Rev. 87 (1955).
57 De Vito v. United Airlines, 98 F. Supp. 88 (E.D.N.Y. 1951).
58 Buck v. Hill, 121 Cal. App. 413, 263 P. 2d 643 (1st Dist. Ct. of App. 1953).
59 Kendall v. United Airlines, 200 F. 2d 269 (2d Cir. 1952).
60 New Haven and Hartford Co. v. Zeramini, 200 F. 2d 240 (1st Cir. 1952).
61 Summerville v. Smucker, 280 App. Div. 839, 113 N.Y.S. 2d 868 (2d Dept. 1952).
62 Pike v. Consolidated Edison Co., 277 App. Div. 1120, 100 N.Y.S. 2d 892 (2d Dept. 1948); new trial granted, 303 N.Y. 1, 99 N.E. 2d 885 (1950).
63 Gall v. Union Ice Co., 108 Cal. App. 2d 303, 239 P. 2d 48 (1st Dist. Ct. of App. 1951).

Division, in affirming an award of $137,566.74, said, "Where the evidence fairly sustains the verdict, the courts are not empowered to declare it excessive upon some economic theory that there must be a limit to a verdict in a death case."[64] In another case, where the decedent had a life expectancy of tweny-five years, earnings of $4,400 the last year of life, and was survived by a thirty-seven year old widow and seven children, a Pennsylvania federal district court allowed an award of $100,000 reduced to $80,000 upon a finding of 20 per cent contributory negligence.[65] The supreme court of North Dakota recently affirmed an award of $55,502.03 where the deceased, a husband and the father of three minor children, had a life expectancy of over forty years and earnings of from $200-$250 a month.[66] The supreme court of New Mexico affirmed on appeal a verdict of $50,000 in a case where the decedent, a twenty-four year old truck driver and structural steel worker, had been wrongfully killed.[67]

A few personal injury awards deserve notice because the relationship of personal injury and wrongful death cases is close, and awards in other jurisdictions are of particular interest in evaluating the proper measure of damages for both types of cases in Colorado. In *Watson v. Florida Power and Light Company,*[68] damages of $260,000 were awarded by a Florida tribunal for personal injuries. A plumber who was permanently injured when a pipe on which he was working blew up in his face, was awarded $250,000 in a New Jersey action.[69] In a 1954 California case, a seventeen year old boy received $97,000 for serious injuries,[70] and in another recent decision from California, a pedestrian on a railroad platform who suffered serious injury when struck by an engine overhang was awarded $25,000 in damages by the jury.[71] In *Hildebrand v.* United States,[72] $65,489 was awarded the plaintiff for injuries

64 Neddo v. New York, 275 App. Div. 492, 501, 90 N.Y.S. 2d 650, 656 (3d Dept. 1949).
65 Thomas v. Conemaugh Black Lick R. R., 133 F. Supp. 533 (W.D. Pa. 1955).
66 Geier v. Tjaden, 74 N.W. 2d 361 (N.D. 1955).
67 Hall v. Stiles, 57 N.M. 281, 258 P. 2d 386 (1953).
68 Watson v. Florida Power and Light Co., 50 So. 2d 543 (Fla. 1951).
69 Keiffer v. Blue Seal Chemical Co., 196 F. 2d 614 (3d Cir. 1952).
70 Hawk v. City of Newport Beach, 286 P. 2d 481 (4th Dist. Ct. of App. 1954), *aff'd.*, 293 P. 2d 48 (Calif. 1956).
71 Gibson v. Southern Pac. Co., 290 P. 2d 347 (1st Dist. Ct. of App. Cal. 1955).
72 Hildebrand v. United States, 134 F. Supp. 514 (S.D.N.Y. 1954).

including a fractured wrist requiring corrective surgery, and a compression fracture of certain vertebrae with subsequent surgery.

In a Florida malpractice suit, where the defendant had unsuccessfully employed the Koch method of treatment on the plaintiff's lip in treating a malignant growth which then spread into the full lip and chin, the plaintiff was awarded $65,000 in damages.[73] A 1955 New Mexico decision, *Thompson v. Anderman,*[74] awarded a thirteen year old boy with a low mentality, $54,000 for serious injuries likely to cause epileptic seizures. The Texas Court of Appeals sustained a verdict of $50,000 in another 1955 case where the plaintiff, a fifty-year old deputy sheriff, suffered ruptured muscles, a ruptured disc with nerve involvement and sciatic pain, chip fractures of the fifth and sixth vertebrae, a ruptured eardrum and a broken nose.[75]

Damages awarded for personal injuries in Colorado are not usually high. However, in *Cahall v. Colorado Wyoming Railroad Company,* [76] a thirty-eight year old brakeman earning $200 a month, received $84,584 in damages for the loss of his left hand and right forearm. $75,000 was awarded in a 1952 Colorado case, to a mental patient who fell or jumped from a hospital window and suffered paralysis from the waist down,[77] but the decision was later reversed for want of evidence of future loss of earnings. In *Riss & Company v. Anderson,*[78] the plaintiff was awarded $23,303.50, in a case against his employer, a railroad company. In another railroad case an award of $15,000 to a fifty-two year old Colorado section hand was held not to be excessive.[79] The Colorado supreme court awarded $33,918 in damages in a 1955 case, to a plaintiff who had suffered a ruptured vertebrae of the neck.[80] A $250,000 suit for damages for personal injuries was settled out of court in November of this year in Denver District Court, for $50,000 cash. $48,000 of

73 Baldor v. Rogers, 81 So. 2d 658 (Fla. 1954).
74 Thompson v. Anderman, 59 N.M. 400, 285 P. 2d 507 (1955).
75 Prater v. Holbrook, 283 S.W. 2d 263 (Tex. Civ. App. 1955).
76 Cahill v. Colorado & Wyoming Ry., U. S. Dist. Ct., Dist. of Colo., Civ. No. 3352 (10th Cir. 1952).
77 United States v. Gray, 199 F. 2d 239 (10th Cir. 1952).
78 Riss & Co. v. Anderson, 108 Colo. 78, 114 P. 2d 278 (1941).
79 Denver & Salt Lake R. R. v. Granier, 104 Colo. 131, 89 P. 2d 245 (1939).
80 Thomas v. Dunne, 131 Colo. 20, 279 P. 2d 427 (1955).

this settlement was for injuries suffered by one of the three plaintiffs, who will, as a result of her injuries received in an automobile collision, be confined to a wheel chair for the rest of her life. The ohter two plaintiffs received minor injuries in the same accident.[81] Had the injured plaintiff in any of the six Colorado cases listed above died of his injuries, his dependents would have been able to collect, at the most, $10,000 in damages. Clearly it is more economical in Colorado to kill than merely maim.

In the past twenty years, Alaska and all of the states with statutory limits on damages for wrongful death have raised their maximum limits as shown in the following chart:

STATE	1935 limit[82]	1955 limit[83]
Alaska	$10,000	$50,000
Colorado	$ 5,000	$10,000
Illinois	$10,000	$25,000
Indiana	$10,000	$15,000
Kansas	$10,000	$25,000
Maine	$ 5,000	$10,000
Massachusetts	$10,000	$20,000
Minnesota	$ 7,500	$17,500
Missouri	$10,000	$25,000
New Hampshire	$10,000	$15,000
Oregon	$ 7,500	$17,500
South Dakota	$10,000	$20,000
Virginia	$10,000	$25,000
West Virginia	$10,000	$20,000
Wisconsin	$10,000	$15,000

It should be noted that Colorado with its $5,000 limit, was in 1935 most conservative in its ceilings on damages, as it is today. The District of Columbia and Connecticut had limits of $10,000 on death awards in 1935, but today have no statutory provisions limiting damages.[84] Virginia has twice raised her maximum limit on damages since 1935 and Alaska currently allows five times as great as award as was permitted twenty years ago.

Melvin M. Belli in his book *Modern Trials*[85] observes that awards in wrongful death cases have increased more than in any other particular type of case. Some states still arbitrarily restrict the amount of the death award, although no justifiable reason, economic, moral or social, presents itself. Mr. Belli says, "Some states, with statutory limitations have raised the amount, but so niggardly, that one must conclude the purpose of the offered gratuity was actually to forestall an attempt completely to remove all statutory restrictions in the particular jurisdiction."[86] Professor McCormick has noted that under an old Anglo-Saxon law each man had his price according to his rank which had to be paid to his

81 Huber v. Scheier and John Deere Plow Co., Colo. Dist. Ct., 2d Judic. Dist., Civ. No. B-2555 (1956).
82 McCormick, Damages 385 (1935).
83 See notes 10 & 11 supra.
84 See note 82 supra.
85 Belli, Modern Trials, § 411 (1954).
86 *Id.* at 2541.

next of kin if he were slain, and has compared this old idea with the fixed sum recovery limits in some American death acts.[87]

Further, he asserted:

> "It may be supposed that such limitations were political concessions made to the opponents of the original acts which introduced liability for death and that they were conceded because of a general mistrust that juries might allow exorbitant sums for fatal injuries for which no doctrines for measuring damage had been charted."[88]

In considering the Colorado wrongful death act and its history, several items are of interest. If there was any opposition to the original death act, such opposition was not vocal,[89] and the fact that no limit on damages was included in the law should be noted.[90] What influence caused the 1877 legislature to limit the damages in death actions[91] is open to speculation, possibly a general mistrust of juries, or the effect of an insurance lobby.

Mr. Belli has stated that private insurance companies in California advocated, in advertising to prospective jurors, that awards should be cut or the insurance companies would "go broke" and insurance would soon cost "more than you can pay." This advertising was not, according to Mr. Belli, joined in by all private insurance companies. Mr. Belli suggests that perhaps with revaluation of premums there will have to be, likewise, a more efficient operation, with less of the premium dollar going to the companies.[92]

The effect on damages of changes in the economy is well stated in a recent law review note, "If the economy is marked by gradually rising costs, verdicts based on today's wages and costs and ideas of the value of money will naturally tend to exceed verdicts of a decade or more ago."[93] The article mentions that the courts should take into account well known and apparently permanent changes in the purchasing power of money and points out that statutory limits in death actions make no more sense than in actions for

87 See note 82 supra.
88 *Ibid.*
89 Colo. H. Jour. 9th Sess. (1872).
90 Colo. Laws at 342 (1872).
91 Colo. Laws c. 877 §§ 1-3 (1877).
92 See note 85 *supra* at 2542.
93 James, Jr., Damages in Accident Cases, 41 Cornell L.Q. 582 at 605 (1956).

personal injuries and cannot be justified in view of changes in amounts of verdicts in states where no statutory limits exist.[94] An article in the Louisiana Law Review points out that if counsel can show that the recovery in his case is excessive or inadequate in view of the actual change of the purchasing power of the dollar, the court will probably adjust the award on that basis.[95] Using the figures given by the United States Bureau of Labor statistics, a verdict of $5,000 in 1916 should have been $11,905 in 1951 if increased equally with rises in cost of living. On the basis of these figures one must conclude that even in 1951 when the Colorado Legislature doubled the death award they were oblivious of the economic change in the situation at that time. That the Colorado Supreme Court has not always agreed with the legislature as to the monetary worth of a human life is shown by the fact that the court in 1917 allowed damages in the amount of $12,500 to a widow with one child, for the wrongful death of her husband.[96] This case was brought under the Federal Employer's Liability Act which does not limit damages for wrongful death. It is interesting to observe that the court awarded damages, in this case, of an amount two and one-half times greater than the maximum damages then allowed by the state's wrongful death statute.

From the present state of the law limiting damages in Colorado wrongful death actions, these conclusions are self evident; that it is cheaper in Colorado to kill than to injure; that Colorado has the least progressive and least humane wrongful death law in the nation; that if the insurance lobby, rather than legislative inertia and conservatism, is responsible for the $10,000 limit on damages, that lobby operates in a skillful, subtle manner; that the Colorado statute is entirely unrealistic in view of the current economic situation; and that Colorado lags behind all of the other states and territories in placing a proper value on human life.

It is to be hoped that, during the present session of the Legislature, Colorado's law makers will revise the wrongful death statute, clarifying its language and bringing it up to date. In the opinion of this writer the following changes in the law should be

94 *Id.* at 606-08.
95 Comment, 15 La. L. Rev. 743 (1955).
96 Vallery v. Barrett, 63 Colo. 548, 167 Pac. 979 (1917).

made: (1) Clarification of the language regarding those entitled to sue.

The present statute provides that suit may be brought "By the husband or wife of deceased; or if there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased. . . ."[97]

Amendment should eliminate any confusion relating to the right of the widow or widower to bring an action during the second year after the wrongful act has occurred. (2) The time limit during which an action may be brought should begin to run upon occurrence of the death, rather than upon the happening of the wrongful act.[98]. It is conceivable that an injured person could linger upon the brink of death for two years and one day, in which case the surviving heirs would be deprived of just damages for his death. Since, in any case the plaintiffs has the burden of proving the defendant's wrongful act caused death, it would seem more fair to allow a period of one or two years after the death for filing the action. (3) The provision, "having regard to the mitigating or aggravating circumstances attending any such wrongful act . . ."[99] should be eliminated, or the section should be revised to allow exemplary or punitive damages in which the mitigating or aggravating circumstances would be properly considered. The most drastically needed reform in the wrongful death act, is the elimination of any maximum limit on recoverable damages. Under our judicial system, juries, with proper instruction, are deemed capable of awarding just damages in personal injuries actions and in many types of contract and tort suits. Why they should be considered incapable of so doing in death cases is incomprehensible, particularly since the courts may force reduction of jury awards or grant new trials, where damages awarded are excessive. Should the Colorado wrongful death act be revised as here suggested, that act and the survival act together, would provide a realistic and just basis for attempting to compensate in dollars the loss of human life.

97 Colo. Rev. Stat. Ann. § 41-1-1(a) (b) (1953).
98 *Id.* § 4.
99 *Id.* § 3.

NOTES AND COMMENTS

A Non-Judicial Dissent to Amendment of Canon 35

BY JOHN BUSH

John Bush: Born Denver, Colo.; graduated from University of Colorado, 1951, B. S. (Business Finance); senior at University of Denver College of Law, Associate Editor of **Dicta.**

On December 12, 1955, the Colorado supreme court entered an order appointing Mr. Justice Moore "referee to consider the Canons of Professional Ethics and the Canons of Judicial Ethics."[1] The purpose was to consider whether the canons should be "continued, revoked or modified . . ."[2] Six days of public hearings, at which all were invited to attend and present their views, were held. First considered were matters pertaining to Canon 35 of the Canons of Judicial Ethics. This comment is concerned with the report and recommendation issued by the referee after the hearings on Canon 35. The Colorado court en banc approved and adopted the referee's report on February 27, 1956.[3]

The Canon was first adopted by the American Bar Association upon the recommendation of the judicial committee on September 30, 1937.[4] It was adopted by the Colorado supreme court on July 30, 1953.[5] The Colorado supreme court supplemented the canon in December, 1955 with an order which required literal compliance with the canon.[6] Matters regarding judicial canons and their amendment, have in the past been considered within the sole discretion of the courts. The referee concluded his report with a recommended amendment to Canon 35. In adopting the report, the Colorado supreme court has adopted the referee's recommendation. As thus amended the Canon provides:

Proceedings in court should be conducted with fitting dignity

1 **Re Canon of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956).**
2 *Ibid.*
3 *Id.* **at 605, 296 P.2d at 473.**
4 **37 J. Am. Jud. Soc. 149 (1954).**
5 **1 Colo. Rev. Stat. Ann. 156 (1953).**
6 **Orders and Judgments (of the Colorado Supreme Court), Bk. 43, P. 480.**

> and decorum. Until further order of this Court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.[7]

Mr. Justice Moore's report concludes that two dangers must be avoided. The first is that under the guise of preserving the dignity and decorum of the court a civil liberty, freedom of the press, might be invaded or nullified. The second is that under the guise of protecting the same civil liberty, freedom of the press, individuals might detract from the court's dignity, distract witnesses, degrade the court, or create misconceptions in the public mind.[8]

Canon 35 in its original form assumed that court room radio and television broadcasting and photography interfere with the administration of justice. Tests conducted before the referee convinced him that this assumption is no longer justified. Under the new Colorado canon, the trial judge must decide under the facts and circumstances of the particular case whether all or any part of the proceedings should be withdrawn from complete press and air coverage in order to insure proper administration of justice in that case. Essentially, therefore, the report concludes that Canon 35 in its original form constitutes a prior restraint on the freedom of the press which is arbitrary and discriminatory and does not bear a fair relationship to the public welfare.

The report indicates that the question of whether or not the restrictions imposed by the original canon on freedom of the press are legally justified depends only on whether photography and broadcasting will detract from the dignity and decorum of the court, distract the witnesses, degrade the court or create misconceptions in the minds of the public. In this context, there seems to be no doubt that the conclusion of the report is correct. It is submitted that the conflict can be more properly stated as a conflict between two civil liberties and not as stated in the report. The real conflict is between the right of a litigant to a fair trial and the freedom of the press. The rights of parties to actions, particularly the rights of defendants in criminal proceedings, were not directly considered during the hearing, nor is there any statement in the report to indicate that the referee gave any weight to these rights. He did, however, acknowledge the possible danger to the right of fair trial.

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7 See note 1 *supra* at 603, 296 P.2d at 472.
8 *Id.* at 594, 296 P.2d at 468.

The hearing lasted six days. During that time, with the possible exception of about twenty minutes, representatives of the mass communication industry testified, performed demonstrations and argued their side of the case. The defendant in the criminal case of the future was not present nor was his case argued. The representatives of the industry clearly proved that photography, broadcasting and televising, if properly done, will not cause physical interference in a trial proceeding. However, this fact is important only if the court correctly stated the main conflict at issue.

The report states that if relaxation of the original canon causes detraction of court room dignity and decorum, the canon should be retained in its present form. Dignity, however, is not a substantive right possessed by the judicial system. It is but a means of creating the proper atmosphere to make possible a proceeding which will insure the defendant a fair and impartial trial. Dignity, in and of itself, is not the end sought and therefore, is not the paramount issue involved. Furthermore, the report states, the previously prohibited activities will not be allowed in a case where they distract witnesses while giving testimony. At the hearing, the questions propounded by the refree and the testimony of representatives of the mass communication industries dealt with the possible distraction of witnesses in only two ways. The first was whether or not the broadcasting or photography would cause any physical interference with the giving of testimony. The second was whether or not the witness' knowledge that his testimony was being broadcast would render him so nervous or self-conscious as to decrease his ability to testify understandably.

The next danger considered, the possibility that broad courtroom publicity might create misconceptions in the minds of the people, was dealt with by considering whether or not such publicity would serve to educate the public in the workings of the judicial system. The above dangers might affect a defendant's rights, but at most, indirectly. The rights that a defendant is most concerned about were not presented or argued. These must be considered and weighed against the opposing considerations before one can be confident that the step taken is in the right direction.

Considering the rights of a defendant in a criminal proceeding, the Colorado Constitution provides that "no person shall be deprived of life, liberty or property without due process of law."[9] This section guarantees a defendant a fair and impartial trial as does the Fourteenth Amendment to the Constitution of the United States.[10] A fair and impartial trial demands that the defendant have an opportunity to be heard.[11] Inseparable from the right to be heard is the right to present witnesses. To the extent that the testimony of his witnesses is made less effective by outside influences, the defendant's right to be heard is undermined. The report concluded that since there is no physical distraction the right to present the uninhibited testimony of witnesses remains unabridged.

9 Colo. Const., art. II, § 25 (1876).
10 Wharton v. People, 104 Colo. 260, 90 P.2d 615 (1939); In re Murchison, 349 U.S. 133 (1954); In re Oliver, 333 U.S. 257 (1947).
11 In re Oliver, *supra* note 10.

It was further concluded that the knowledge of a witness that his testimony is being broadcast or televised will not adversely affect his ability to testify. The conclusion was based upon testimony of highly respected commentators and news men. But it was testimony only of their opinions as laymen which are of limited value in the field of judicial administration. Moreover, it must be noted that they were interested witnesses. Assuming, however, that the conclusion is correct, there are other questions that need answering. Prior to any criminal trial the prosecutor's case will have been fully presented to the public because of the publicity given the preliminary hearing. Public sentiment, usually against an accused person, will have been crystallized. Will not a witness' recollection of the facts in favor of the defendant be colored by the publicity and public sentiment? Again, even if a witness' recollection is unaffected, will not the fact that his testimony is broadcast make him reluctant to fully state the facts in favor of the defendant, in the face of adverse public sentiment? The amended canon reserves to a subpoenaed witness the right to prevent broadcast of his testimony by objecting, but he must take the initiative by objecting. The question remains whether, as a practical matter any witness will feel entirely free to object in the atmosphere created by advance publicity.

Due process requires that a defendant's right to a presumption of innocence not be abridged.[12] The Colorado Constitution guarantees a right to an impartial jury.[13] What affect will the broadcast of preliminary hearings in a criminal case have on the prospective juror's ability to make an impartial decision?[14] What effect will it have on the defendant's right to be presumed innocent? Another problem is whether the resultant public sentiment will have adverse affect on these rights during the trial.

Many responsible jurists, lawyers, and journalists believe that court proceedings can be, and frequently are, materially influenced under the prevailing system of allowing daily comment on the court proceedings.[15] Their arguments would apply more forcibly against fragmentary, editorialized presentation of the actual proceedings by means of radio and television broadcasting. The underlying principle behind this viewpoint is well stated as follows: "Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge."[16]

After the newsworthy facts of a criminal case have been presented to the public through radio and television, there is no doubt

12 Eddy v. People, 115 Colo. 488. 174 P.2d 717 (1946).

13 Colo. Const., art. II, § 16 (1876).

14 Colo. Rev. Stat. Ann. § 78-5-3 (1953) sets out the test for jury bias. There is serious question whether the test is adequate for the present circumstances. It was applied at least as early as 1874. Jones v. People, 2 Colo. 351 (1874).

15 E.g., Shepard v. Florida, 341 U.S. 50 (1950) (although reversed on other grounds the court declared that the press interference constituted sufficient grounds for reversal); Pennekamp v. Florida, 328 U.S. 331, 350 (1945) (concurring opinion by Justice Frankfurter discussing dangers of trial by newspaper. See also, Phillips & McCoy, *Conduct of Judges and Lawyers* 187 (1952); Perry, The Courts, the Press and the Public, 30 Mich. L. Rev. 228 (1931).

16 Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950).

that the defendant's right to a presumption of innocence has been wiped away in the public eye and he has been done irreparable harm even though the jury may find him not guilty. This argument can be met by the argument that operation of the presumption of innocence is limited to the court room, and it has no force in the arena of public opinion. Undoubtedly, innocent persons have been and will be subjected to the rigors of criminal proceedings. At best it can be said that these unfortunate occurences are necessary evils, but it is not necessary to compound the damage by televising and broadcasting their trials.

The report's contention that all that transpires at a trial is public property, and therefore the public has a right to know everything concerning the trial, is supported by a quotation to that effect from the United States Supreme Court in the *Craig* case.[17] It is unfortunate but several such broad and general statements can be found. The constitutional provision is that "the *accused* shall have the right to a speedy public trial . . ."[18] There is no mention of a right guaranteed to the public. This provision was intended to afford a right only to the accused, a right which would guarantee him a fair and impartial trial.[19]

The legitimate public interest in a trial is twofold.[20] First, in

17 Craig v. Harney, 331 U.S. 367, 374 (1946) "A trial is a public event. What transpires in the court is public property."

18 Colo. Const., art. II, § 16 (1876).

19 In re Oliver, 333 U.S. 257 (1947); Pennekamp v. Florida, 328 U.S. 331, 350 (1945) (concurring opinion); Kirstowski v. Superior Court, ... Cal. App. ..., 300 P. 2d 163, Calif. 3d Dist. Ct. of App. (1956); 1 Cooley, Constitutional Limitations 647 (8th ed. 1927).

20 Pennekamp v. Florida, *supra* note 19; Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950); Boldt, Should Canon 35 of the Code of Judicial Ethics Be Revised? 16 Fed. R.D. 83 (1954).

a free society it is imperative that the public be educated in the methods of judicial administration. Second, the public must be constantly aware of whether or not the courts are fully protecting the liberties guaranteed to the people. The details of any particular case are only incidental to this dual public interest in a trial. Nowhere can one find any mandate as to what method must be used to satisfy the public interest in trial proceedings. *Craig* and similar cases should be placed in proper perspective.[21] They were cases involving contempt proceedings for allegedly improper comments on trial proceedings. None of them prescribed a mandatory method of bringing information of trial proceedings to the public. Each was only a factual determination that the particular defendant's action did not present a clear and present danger to the administration of justice. They reaffirmed the idea that a court has the inherent power to suppress any serious and imminent threat to the administration of justice. The factual determination in the above cases was strongly criticized by Justice Jackson as follows: "This court has gone a long way to disable a trial judge from dealing with press interference with the trial process."[22] Even more important is the fact that the cases were all tried to judges sitting without juries. This fact has been suggested as a reason for the broad statement of the public's right.[23]

The referee's report states "here then is a case involving a conflict between liberty and authority, a conflict that is sometimes labeled 'civil right v. the police power' or 'liberty of the individual v. the general welfare.' "[24] It is more accurately stated as a conflict between freedom of the press and the right to a fair and impartial trial. Both freedoms are of equal dignity. "Newspapers in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial."[25] The same rule should apply to radio and television. In a case where no particular medium of communication is required to satisfy the legitimate public interest in a trial and a reasonable means to fulfill that requirement is already provided, weighing the balance in favor of freedom of the press is not justified. The conclusion of the report rests heavily on the fact that modern technological advances have made possible live broadcasting and televising without physical disturbances. Whether or not there is a physical distraction should not be the sole test. To assure that the step taken does not abridge the right of fair trial, this right should be given full consideration. If it is determnied that there is no abridgment of this right, or any abridgment is out-weighed by the value of a completely free press, then that assurance will be possible.

21 Pennekamp v. Florida, 328 U.S. 331 (1945); Bridges v. California, 314 U.S. 352 (1941).
22 Shepard v. Florida, 341 U.S. 50, 52 (1950).
23 *Ibid.*
24 Quoting Hamilton v. City of Montrose, 109 Colo. 228, 231, 124 P.2d 757, 759 (1942).
25 Shepard v. Florida, 341 U S. 50, 53 (1950).

NOTES AND COMMENTS

Twenty Years of Colorado Supreme Court Decisions Without Law

BY MELVIN ARNOLD COFFEE

Melvin Coffee: Born Chicago, Illinois; attended University of Colorado; member of Pi Gamma Mu, national social science honorary; student member of Colorado Bar Association; now completing junior year at University of Denver College of Law; student business manager of Dicta.

This article is an editorial on the *fact* of the trend in the Colorado supreme court to affirm district and county court rulings without written opinions, without stating reasons and without citing authority to sustain affirmance. It is written with a firm conviction that the supreme court, to a very great extent, is responsible for the freedoms of Colorado citizens. In the charts that follow, the figures representing decisions from 1936 to 1948 are based upon three articles in the Rocky Mountain Law Review.[1] The figures representing decisions from January Term 1949, through December Term 1955, are based upon a case by case analysis by this writer.[2]

There is much confusion created when a lower court ruling is affirmed without written opinion. Practitioners cannot know the effect of such a decision upon the validity or applicability of pre-existing law as stated by the judge who tried the case. Does such a judgment uphold the trial court's opinion thereby strengthening it, or is the high court merely dodging issues because of facts peculiar to the particular case? Or does the supreme court feel that the law is so clear and so manifestly applicable to the facts that they will not glorify nonsensical contentions by explaining to the plaintiff in error why the lower court ruling must be affirmed?

Rule 118(f) of the Colorado Rules of Civil Procedure provides that, "Any judgment may be affirmed without written opinion. . . ."[3] Evidently the Colorado supreme court has a tendency to interpret "may" as "shall" for it is a fact that from 1936 through 1955 more and more attorneys, percentagewise, received a single blue-backed typewritten sheet from the clerk's office stating that the issues raised by the plaintiff in error had been decided with a perfunctory "AFFIRMED WITHOUT WRITTEN OPINION." Neither the client nor the progress of the law gains from the great amount of money necessarily expended in the prosecution of a review decided in such a manner.

Of perhaps more importance than the client's money is the effect of such a decision on the attorney-client relation. One should

1 Blickhahn, The Trend—Survey of the Work of the Colorado Supreme Court in 1947 and 1948, 21 Rocky Mt. L. Rev. 202, 204 (1948); Bowen and De Souchet, The Trend—Survey of the Work of the Colorado Supreme Court, 1942-1946, 19 Rocky Mt. L. Rev. 274, 276 (1947); Holme, Jr., Williams, and Driscoll, Jr., The Trend—Survey of the Work of the Colorado Supreme Court, 14 Rocky Mt. L. Rev. 213, 214, 215 (1942).

2 These figures include decisions in cases of original proceeding such as disbarment proceedings, interrogatories of the senate, interrogatories of the governor and declaratory judgments of peculiar nature, thereby decreasing the true percentage of affirmances without written opinion.

3 Colo. Rules Civ. Proc. 118 (f).

think that counsel's advice to appeal would usually be well-founded, i.e., that at least one point of law decided unfavorably below is at least questionable to the prejudice of the prospective plaintiff in error. The figures show, however, that as of recent times approximately twenty-five per cent of all such advice must have been completely ill-founded. This surely does nothing to strengthen an attorney-client relation.

Of greatest lasting importance, however, is the impact of this trend upon democratic theory as traditionally practiced in America. Without a prolonged dissertation on the essence and mechanics of a democracy, it may be assumed that one of its tenets is that which demands a government of laws and not a government of men. This political principle means that men and their cases are to be judged by fixed standards only. Further, it means that everyone knows, or at least can know, that if he acts in a certain manner, certain results will follow. An affirmance without opinion fails to provide knowledge or notice of the law which governs. It does not make the law clear, certain or definite. Instead law students, practitioners and jurists find themselves in a state of uncertainty illustrated in a recent dispute:

> It is the contention of the Plaintiff in Error that the information did not charge rape. It is true that a similar fact situation was presented in Sanchez et al v. People, No. 17809, 293 P. 2d. 297, decided February 14, 1956 and it is true that the question was squarely presented by the briefs in that case.
>
> It was indeed unfortunate that the case was dispensed with the omnipotent words "AFFIRMED WITHOUT WRITTEN OPINION". These words neither add to nor subtract from the existing law on the subject. These words mean only that for some reason this court decided that the conviction should be affirmed without an opinion.
>
> That decision is not law on any point.
>
> We are sure that the Attorney General does not mean that that case affirmed, reversed, distinguished, accepted or rejected the existing Colorado law on the subject . . .
>
> We cannot read minds; we do not know why the conviction was affirmed without written opinion . . .
>
> Presumably we are arguing here legal points and we are entitled to a legal decision, not only to guide this case, but all similar cases in the future. The Attorney General argues that the Supreme Court has ruled adversely in the *Sanchez* case, supra, but what lawyer could find such law in the *Sanchez* case?[4] We are surprised that the Attorney General would cite such a case in view of the fact that there was no opinion to guide anyone in the law. What lawyer could find the law in the *Sanchez* case?

[4] Reply Brief of Plaintiff in Error in *Cedillo v. People*, Colo. Sup. Ct. No. 17905, pp. 5-7. Both the Cedillo and the Sanchez case involved the question whether the court has jurisdiction over the subject matter of rape if an information fails to negate a marital relation between the prosecutrix and the defendant. Both were affirmed without written opinion.

That which deals with the law should be qualitative rather than quantitative. It is perhaps ironic that this article, with the graph and table that follows, emphasizes the quantitative with the sole aim of improving the qualitative.[5]

Affirmances Without Opinion from Jan. Term 1949 through Jan. Term 1956

Term	Total Cases	Civil	Criminal	No Written Opinion In Civil	No Written Opinion In Criminal	Total Affirmances Without Written Opinions	Percentage of Decisions Affirmed Without Written Opinion	Source
1949								
Jan.	45	39	6	1	0	1	2.22	119 Colo.
Apr.	61	53	8	1	0	1	1.64	119, 120 Colo.
Sept.	48	42	6	6	0	6	12.50	120, 121 Colo.
1950								
Jan.	46	40	6	6	0	6	13.04	121 Colo.
Apr.	66	61	5	10	1	11	16.67	121, 122 Colo.
Sept.	61	51	10	3	1	4	6.56	122, 123 Colo.
1951								
Jan.	28	27	1	3	0	3	10.71	123 Colo.
Apr.	64	51	13	10	2	12	18.75	123, 124 Colo.
Sept.	58	48	10	9	0	9	15.52	124, 125 Colo.
1952								
Jan.	48	42	6	7	1	8	16.67	125 Colo.
Apr.	59	51	8	6	2	8	13.56	125, 126 Colo.
Sept.	69	61	8	17	1	18	26.09	126, 127 Colo.
1953								
Jan.	55	52	3	10	1	11	20.00	127 Colo.
Apr.	83	77	6	11	2	13	15.66	127 Colo.
Sept.	82	78	4	24	0	24	29.27	128 Colo.
1954								
Jan.	64	54	10	17	0	17	26.56	128, 129 Colo.
Apr.	87	82	5	23	0	23	26.44	129, 130 Colo.
Sept.	76	67	9	21	2	23	30.26	130 Colo.
1955								
Jan.	75	70	5	18	0	18	24.00	131 Colo.
Apr.	102	93	9	28	1	29	28.43	131, 132 Colo.
Sept.	61	54	7	7	0	7	11.48	132 Colo. and files of Colo. Sup. Ct. Reporter
1956								
Jan.	58	?	?	?	?	14	24.00	files of Colo. Sup. Ct. Reporter

See graph following page

[5] For analyses of a similar problem in the Supreme Court of the United States, that of denial of certiorari, see Harper and Rosenthal, What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari, 99 U. Pa. L. Rev. 293 (1951); Harper and Etherington, What the Supreme Court Did Not Do During the 1950 Term, 100 U. Pa. L. Rev. 354 (1952).

Percentage of Decisions Without Written Opinions
from Jan., 1936 - Jan., 1956